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HUMPHREY MILFORD
PUBLISHER TO THE UNIVERSITY

PUBLICATIONS OF THE

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

DIVISION OF INTERNATIONAL LAW

WASHINGTON, D.C.

BY THE EDITOR OF AND UNIFORM WITH THIS ANALYSIS OF CASES:

JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION

Cases decided in the Supreme Court of the United States (2 *vols.*, 4*to*)

THE UNITED STATES OF AMERICA

A Study in International Organization

I cannot refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. (Lord Campbell in *Regina* v. *Millis*, 10 Clark & Finnelly, 777, decided in 1844.)

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand. (Chief Justice Fuller in *Kansas* v. *Colorado*, 185 United States, 125, 146–7, decided in 1902.)

Confederations have existed in other countries than America; republics have been seen elsewhere than upon the shores of the New World; the representative system of government has been adopted in several states of Europe; but I am not aware that any nation of the globe has hitherto constituted a judicial power in the same manner as the Americans. (Alexis de Tocqueville, *De la Démocratie en Amérique*, 2 vols., 1835, vol. i, p. 158.)

The Supreme Court of the United States, which is the American Federal institution next claiming our attention, is not only a most interesting but a virtually unique creation of the founders of the Constitution. . . . The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or in the modern world. (Sir Henry Maine, *Popular Government*, 1886, pp. 217–18.)

American experience has made it an axiom in political science that no written constitution of government can hope to stand without a paramount and independent tribunal to determine its construction and to enforce its precepts in the last resort. This is the great and foremost duty cast by the Constitution, for the sake of the Constitution, upon the Supreme Court of the United States. (Edward John Phelps, *The United States Supreme Court and the Sovereignty of the People*, 1890; *Orations and Essays*, 1901, pp. 58–9.)

The extraordinary scope of judicial power in this country has accustomed us to see the operations of government and questions arising between sovereign states submitted to judges who apply the test of conformity to established principles and rules embodied in our constitutions.

It seems natural and proper to us that the conduct of government affecting substantial rights, and not depending upon questions of policy, should be passed upon by the courts when occasion arises. It is easy, therefore, for Americans to grasp the idea that the same method of settlement should be applied to questions growing out of the conduct of nations and not involving questions of policy. (Elihu Root, *Judicial Settlement of International Disputes*, 1908; *Addresses on International Subjects*, 1916, pp. 151–2.)

Judicial Settlement of Controversies between States of the American Union

An Analysis of Cases Decided in the Supreme Court of the United States

BY

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America has emerged from her struggle into tranquillity and freedom, into affluence and credit. The authors of her Constitution have constructed a great permanent *experimental answer* to the sophisms and declamations of the detractors of liberty. (*Sir James Mackintosh, Vindiciae Gallicae; Defense of the French Revolution and its English Admirers, 1791, p. 78.*)

OXFORD
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1919

TO

ROBERT LANSING

THIS VOLUME, DUE TO HIS PARTIALITY AND FRIENDLY INTERVENTION,
IS AFFECTIONATELY INSCRIBED

PREFATORY NOTE

REASONABLE men believe, statesmen profess, and civilization requires that controversies between nations should be settled by peaceable means. Diplomacy has been reinforced by a variety of agencies to accomplish this purpose, but between the breakdown of diplomacy with its various adjuncts and the outbreak of war an effective remedy must be interposed if the peace of the world is to be preserved.

The framers of the more perfect union of the American States felt the failures of diplomacy and were unwilling to assume the risk of war in the settlement of their controversies. They created as a conscious substitute for each a Court of the States, in which controversies of a justiciable nature between them have been decided for a century and more, thus creating 'an international, as well as a domestic tribunal', to quote the impressive language of Chief Justice Fuller in *Kansas* v. *Colorado* (185 U.S. 125, 146–7, decided in 1902), in which 'we apply Federal law, state law, and international law, as the exigencies of the particular case may demand'. The experience of the Union of American States shows that a court of justice can be created for the Society of Nations, occupying a like position and rendering equal, if not greater, services, applying to the solution of controversies between its members 'Federal law, state law, and international law, as the exigencies of the particular case may demand'. The experience of the Court in the performance of its judicial duties likewise shows: that a court of limited jurisdiction such as is the Supreme Court of the United States, and such as a Court of the Society of Nations must inevitably be, can be trusted to keep within the law of its creation, as every attempt of a citizen of one of the States to sue another State of the Union has been frustrated by the Court itself as contrary to the eleventh amendment of the Constitution negativing that right and privilege; that being a Court of limited jurisdiction it does, as it must, question its own right to entertain jurisdiction of a cause of action, even although the august litigants or their counsel have not questioned it; that a procedure can be and has been devised in the consideration of the concrete case calculated to do and actually doing justice between the States; that the defendant State need not be coerced to appear, if only as in the experience of this Court the plaintiff State be permitted to present its case *ex parte*; that the judgement of the Court need not be executed by force of arms, as hitherto public opinion

has in the long run proved sufficient to overcome the reluctance of the defeated litigant to bow before the decision of the Court, based upon 'Federal law, state law, and international law, as the exigencies of the particular case may demand'.

In view of these circumstances and of every day's experience that it is easier to follow than to originate, the undersigned has, in addition to the publication of the eighty decrees of the Supreme Court in controversies between States, prepared this analysis of the controversies and of the decrees of the Court, eliminating matter which might be deemed irrelevant to the present purpose, disregarding or explaining technicalities which would confuse the layman, but otherwise allowing each case and each decree to tell its story in the language of the Court and of the Judge delivering its opinion. In this way the reader will learn from the cases themselves how and for what purpose the Court was established, how it questions its jurisdiction, how it proceeds from the first to the last step in the case, and how controversies between the States deemed to be political become by the act of submission to the Court justiciable questions, to be decided according to 'Federal law, state law, and international law, as the exigencies of the particular case may demand'.

JAMES BROWN SCOTT.

Washington, D.C.,
November 11, 1918.

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JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION

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RISE OF JUDICIAL PROCEDURE BETWEEN STATES OF THE AMERICAN UNION.

Objects of the Constitution to be achieved by division of the sovereign power.

THE preamble to the Constitution declares that the people of the United States—meaning, as Chief Justice Marshall said in the case of *McCulloch* v. *Maryland* (4 Wheaton, 316, 403), decided in 1819, the people of the States acting within the States—ordained and established it for the United States of America ' in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common Defense, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity '. To accomplish this purpose the framers of this now venerable instrument endowed the more perfect Union with a government composed of legislative and executive branches and a judiciary, apportioning the sovereign powers of a general nature to the government of the Union to be exerted in behalf of all the States instead of any one State or group of States, and leaving with the several States the powers which they already possessed as free, sovereign, and independent States, to be exercised by them in matters solely or primarily affecting the States as such.

Legislative power of Congress

The modicum of legislative power which the framers granted to the Union of the States was vested in a Congress of the United States, and they enumerated this power under eighteen heads in the first article of the Constitution ; intending, however, that, in the exercise of these powers, the Congress should pass any and all laws necessary and proper to carry them into effect, and all other powers vested by the Constitution in the Government of the United States.

Executive power of the President.

The executive power, which is necessarily coextensive with the legislative, as it is to execute the will of the legislative department as far as it is exercised in accordance with the terms of the Constitution, is vested in a President, to be chosen by electors appointed by the States composing the Union, and to serve for a period of four years, who, before assuming office, swears or affirms faithfully to ' execute the Office of President of the United States ', and, to the best of his ability, to ' preserve, protect, and defend the Constitution of the United States ', subject to impeachment for failure to perform the duties appertaining to his office.

Judicial power of the Supreme Court.

The judicial power of the more perfect Union—for the government of the Confederation, superseded by that of the Constitution, had no adequate judicial machinery—was vested by the framers ' in one Supreme Court, and in such inferiour Courts as the Congress may from time to time establish '. To make the judges independent of either branch of the government, they were, upon appointment by the President, to be confirmed by the Senate, ' to hold their Offices during good Behaviour ', and to receive ' at stated Times ', compensation for their services, which was not to be ' diminished during their Continuance in Office '.

The 'Articles of Confederation', 1778–81.

The Declaration of Independence, in severing the bonds connecting the colonies with the mother country, already spoke of them as the United States, recognizing that they were as independent nations under international law. It was foreseen that something more was needed than a mere declaration of union if the States were to act in union and if the fraternal feeling born of the moment was to endure. Therefore, before the Declaration of Independence was framed, a committee had been appointed to consider a form of government, whose labours eventually resulted in the Articles of Confederation, ratified by ten of the States on July 9, 1778, and by the last of the thirteen on March 1, 1781, by virtue of which the United States of America became a Confederation, under an instrument of government known as the Articles of Confederation.

The 9th of the Articles vested the Congress with the power 'of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated . . . of appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of capture'.

Provisions for the decision of inter-State disputes.

Anticipating that disputes between the States would arise in the future as in the past, both between the Colonies and the States themselves, the 9th Article made of the Congress the court of appeal in disputes between them, and provided the following method of appointing a Court for their disposition; upon petition of a State to Congress and notice by that body to the other State, the agents of the States in controversy appeared before the Congress, who by its direction appointed commissioners by joint consent to constitute the Court; failing agreement, the Congress named three persons from each State, and from the 39 thus named, each agent beginning with the defendant, or the Secretary of the Congress in case of absence or unwillingness of one or other to act, struck a name until thirteen remained; from this number not less than seven nor more than nine names were drawn by lot, and of these any five would form the Court. The judges so appointed took an oath to decide without fear or favour, and the judgement, sentence, and proceedings in the case were to be transmitted to Congress 'and lodged among the acts of Congress for the security of the parties concerned'. The same procedure was to be followed in controversies over private right to the soil claimed under different grants of two or more States.

Without dwelling upon the details of proceedings under the 9th Article, particular attention is invited to what may be called the preamble, providing that 'the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever'. There is no doubt or uncertainty in this language. States living together and under a common form of government were likely to have disputes, and, as they renounced diplomacy and the resort to war, some other method had to be provided if the disputes were to be settled and the Confederation to be preserved. The question was not academic, because the charters of the colonies overlapped; and in the dispute between Connecticut and Pennsylvania concerning a strip of territory now belonging to Pennsylvania blood had flowed.[1]

[1] For this controversy see *State of Pennsylvania* v. *State of Connecticut* (131 U.S. *Appendix*, liv), 1781.

But jurisdiction in the matter of boundaries was only one of the differences which the statesmen of that day foresaw, and against which they intended and, in an imperfect way, did provide against. All disputes and differences then existing concerning boundary were to be got out of the way, under the procedure of the 9th Article ; but all disputes and differences concerning jurisdiction were likewise to be settled, and, lest disputes might arise different from those now existing, concerning boundary or jurisdiction, the article authorized the Congress to settle by this method 'any other cause whatever'. In other words, all causes of dispute which could properly be considered by the Congress and referred to the decision of the Commission were to be decided by the appeal to judicial reason instead of the appeal to physical force.

It is only necessary to say, in this connexion, that the 9th Article was a prophecy of better things, rather than a realization ; for only one case was decided and only one commission was appointed under this procedure ; and when the government under the Constitution succeeded the government under the Articles there were controversies between eleven States concerning their boundaries, to mention only differences of this nature, unsettled between the States. The remedy, however, was at hand, as is or can be the case with men of good will. The will to justice, although less known than the will to power, is but a different manifestation of the will that does all things. On May 29, 1787, Mr. Edmund Randolph, on behalf of Virginia, presented what is generally called the Virginian plan for a more perfect union to the Conference of the States met in Philadelphia. The 9th resolution curiously dealt with the question of a judiciary, as if it had in mind the 9th of the Articles of Confederation, and by virtue of the newer article there was to be formed a national judiciary, consisting of supreme and inferior tribunals, with jurisdiction to hear and determine, among other things, 'questions which may involve internal peace or harmony.'[1]

The 'Virginian plan' of 1787 proposes a national judiciary.

On June 19 the Committee of the Whole, to which body the various propositions and drafts had been referred, reported to the Conference for its consideration a draft as altered, amended, and agreed to in committee. The 13th resolution dealing with this subject is thus worded :

> That the jurisdiction of the Natl. Judiciary shall extend to all cases which respect the collection of the Natl. revenue, impeachments of any Natl. Officers, and questions which involve the national peace & harmony.[2]

On August 6 a committee of five members, known as the Committee of Detail, to which the various propositions as originally made and amended were referred, reported to the Conference a draft of the Constitution, the 9th article of which read :

Draft proposals of August, 1787.

> Sect. 1. The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.
>
> Sect. 2. In all disputes and controversies now subsisting, or that may hereafter subsist between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers . . . [similar to, although not identical with, the 9th of the Articles of Confederation].
>
> Sect. 3. All controversies concerning lands claimed under different grants of

[1] Gaillard Hunt, *The Writings of James Madison*, vol. iii, p. 20. [2] *Ibid.*, p. 163.

two or more States, whose jurisdictions, as they respect such lands, shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different States.[1]

So much for the temporary tribunal to be created by the Senate as representing the States. The 11th article of the draft showed that a court of the States was not merely in contemplation but that its creation and jurisdiction were provided for; and it was natural that the permanent court in the minds of the delegates would win upon the temporary tribunal, when they had the whole subject before them; and that, in other words, shortening the processes of history, the permanent court would swallow up the temporary tribunal. The 11th article, in so far as it can be considered material to the present purpose, is as follows:

Sect. 1. The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States. . . .

Sect. 3. The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard Territory or Jurisdiction), between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects.[2]

Proposal to create permanent and temporary courts for different kinds of cases:

It will be observed that the two drafts, taken together, cover the entire field, that a distinction was made between disputes and controversies respecting jurisdiction or territory and other suits of what would be considered a justiciable kind between the States. Sovereignty was uppermost in their minds, and a temporary tribunal was to be created for suits involving it. Therefore, ordinary cases, that is, cases considered by lawyer and judge to be justiciable, whether they involved States or not, were to be tried and determined by the ordinary permanent tribunal; whereas the extraordinary cases, only gradually being brought within the domain of law, were treated as a different category and according to a different method of procedure. The important point is that they were to be treated.

The drafts were submitted to debate and discussion, and what is apparent to us to-day was fortunately apparent to them. They saw that two bodies were not necessary, and that they could invest the permanent court, which was a Court of the States, with the jurisdiction of the temporary tribunal, which would likewise be a Court of the States. The two institutions were amalgamated, and the permanent court invested with the remainder of the 9th article of the project, thus endowing the Supreme Court with the jurisdiction formerly possessed by the Congress under the 9th of the Articles of Confederation, either in identical language or in language to be traced to that source.

Final report.

On September 12, 1787, the Committee on Style reported the Constitution, in so far as the presented matter is concerned, in the terms with which we are familiar, extending the judicial power ' to Controversies to which the United States shall be a Party ;—to Controversies between two or more States '.

[1] Gaillard Hunt, *The Writings of James Madison*, vol. iv, pp. 101–3. [2] *Ibid.*, pp. 104–5.

Text of the existing Constitution.

The provisions of the Constitution relating to the Judiciary of the more perfect union form the subject-matter of the third Article, the material portions of which are

Sect. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.

Sect. 2. The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Story's comments (1816).

Thus was accomplished the 'object of the Constitution', which, according to the measured language of Mr. Justice Story in *Martin* v. *Hunter* (1 Wheaton, 304, 329), decided in 1816, 'was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them.' To this admirable statement Mr. Justice Story, a distinguished citizen of the State of Massachusetts, might have added from the constitution of that State, which is to-day the oldest of all the written constitutions of a body politic, 'to the end, it may be a government of laws, and not of men', which the great Chief Justice Marshall took occasion to repeat in the leading case of *Marbury* v. *Madison* (1 Cranch, 137, 163), decided in 1803, his first opinion on a question of constitutional law.

Both the Union and the individual States subjected to the law.

But the government of the Union, as well as the government of each of the States, was to be a government of laws in a very peculiar sense; for not merely the men invested with government were to be subject to laws, and the people composing the United States and each one of them were to be subject to laws, but the United States and the States themselves were to be subject to laws and the latter to judicial process. In express words, the Constitution, ratified by the people of each State and thus made the Constitution of each as it was the Constitution of them united as States, was to be the supreme law alike of the Union and of the States, and only those Acts of Congress and those constitutions of the States and the statutes of the States were to be valid if they were, on the one hand, made in pursuance of the Constitution, and if, on the other, they were not inconsistent with its terms. Neither the legislative nor the executive department was to decide this question of repugnancy, inasmuch as the Congress and the President, although in different degrees, were part of the law-making power, and therefore should not pass upon their own acts. The judiciary, distinct from each and having no part in framing laws, but with jurisdiction coextensive with the legislative and executive Departments of the Union, was to determine

the question whenever it should be raised in a case involving one or the other of these branches, ' to the end that, it may be a government of laws, and not of men '.

Extent of the Federal Jurisdiction.

Because of the extension of the judicial power of the United States to all cases ' arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ', and of the provision ' that the Constitution, Laws, and Treaties when so made shall be the supreme Law of the Land ', the judges of the Supreme Court and of the inferior courts of the United States were necessarily bound by their terms, and likewise the judges of the States, although, to prevent any doubt on this question, they were specifically declared to be ' bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding '. But in pursuance of this intention on the part of the framers of the Constitution, that the government should indeed be one of laws, not of men, it was provided *inter alia* that the judicial power of the United States should extend not merely to cases of the kind specified, but ' to Controversies to which the United States shall be a party ; to Controversies between two or more States ; between a State and citizens of another State '.

Provision for inter-State disputes. Original jurisdiction of the Supreme Court.

The Government of the Union is not above law, as it was subjected to the law of the Constitution, and no act of the General Government or any branch thereof is valid unless it be made pursuant to the Constitution of the United States. It was naturally contemplated that disputes would arise as to the lawful exercise of sovereign powers on the part of the Union, and it was therefore provided that the judicial power should extend to controversies to which the United States might be a party. The States of the Union had had, as colonies of Great Britain, differences of opinion among themselves, and it was foreseen that, in the more perfect Union of the Constitution, the States composing it might likewise have differences of opinion. Therefore, the judicial power of the Union was to extend to such controversies and apparently to controversies ' between a State and citizens of another State '. But, given the dignity of the States and this extraordinary extension of power to them as such, it was properly provided that, in all cases to which a State should be a party, the Supreme Court of the United States should exercise original jurisdiction.

Necessity for the judicial settlement of inter-State disputes.

It was necessary that the judicial power of the more perfect Union should extend to controversies between and among the States, if such were to be adjusted, as they had renounced the power which free, sovereign, and independent States possess, to ' enter into any Treaty, Alliance, or Confederation ' ; or, without the consent of Congress, to ' enter into any Agreement or Compact with another State, or with a foreign Power ; or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay '. In consideration of the renunciation of the right to resort to war, the Union guaranteed to every State thereof ' a Republican form of Government ', and agreed to ' protect each of them against invasion '. Between diplomacy, whether it be renounced or whether it collapse, and the outbreak of war, there is only a court of justice, and the delegates of the free, sovereign, and independent States of America, in conference assembled at Philadelphia in the summer of 1787, wisely interposed between diplomacy and war a Supreme Court of justice. In the century and more which have elapsed since the creation of the more perfect Union and the establishment of its Supreme Court, a State and citizens of another State have been in litigation. Controversies between the Colonies, which they had been unable to settle, have been decided by the Supreme Court of the Union

upon the request of one or other of them as States. That is to say, controversies of an extremely acute, difficult, and complicated nature, arising before and since the creation of the Constitution and the establishment of its court, have been decided by due process of law, inasmuch as the American system contemplates ' a government of laws, and not of men '.

Inception of the Federal judiciary (1789).

The government of the more perfect Union was to go into effect on March 4, 1789. On the 1st day of April of that year a quorum of the House of Representatives was present; on April 6 a quorum of the Senate, and the day thereafter the Senate took up as its first business the organization of the judiciary, which apparently its members considered the most important task in which it could take the initiative. The House of Representatives entered upon a discussion of duties on imports, a matter of the first importance and which as a money bill could only originate in that branch of the legislature. Of the Senate committee to consider the judiciary, Ellsworth was chairman with seven colleagues, among whom Richard Henry Lee of Virginia had moved the Declaration of Independence in the Continental Congress and Messrs. Patterson of New Jersey, Strong of Massachusetts, Bassett of Delaware and Few of Georgia had been members of the Federal Convention, in which Oliver Ellsworth himself had played a leading and, it may be said, a dominating rôle. On September 24 the measure, known as ' An act to establish the judicial courts of the United States ', was signed by President Washington.

Judiciary Act of 1789. The Supreme Court.

It was provided in this act, commonly known as the judiciary act, prepared chiefly by Ellsworth and in whose handwriting it still exists, that the Supreme Court of the United States should consist of a Chief Justice and five Associate Justices, four of whom should form a quorum; that it should hold annually at the seat of government, which was not then determined, two sessions, the first on the first Monday of February, the second on the first Monday of August. Exercising the power vested in the Congress to ordain and establish inferior courts, the Union was, for judicial purposes, divided into thirteen districts, one for each State adopting the Constitution, one for the territory of Maine, then an outlying part of Massachusetts but destined to become a State of the Union, and one for Kentucky, then a part of Virginia but already in the process of organization as a separate State; and in each one of these a district court was established with a federal judge, known as the district judge. Two of the thirteen States were not covered by the terms of this act, inasmuch as Rhode Island and North Carolina, in the exercise of their sovereign pleasure, had not as yet adopted the Constitution and become a part of the more perfect Union. Vermont likewise was beyond the scope of the act, inasmuch as that sturdy community, which had refused to be a part either of New York, New Hampshire or Massachusetts, had not yet been admitted as the fourteenth State of the Union upon an equality with the thirteen, which we of America affectionately call the original States.

District Courts.

Circuit Courts.

For purposes of justice, which cannot be confined within the lines of any State, however powerful and however extensive its boundaries may be, the eleven States were divided into three circuits, the eastern consisting of the districts of New Hampshire, Massachusetts, Connecticut, and New York; the middle of the districts of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia; the southern of the districts of South Carolina and Georgia; and the judges thereof, known as circuit judges, were, according to the provisions of the act, to consist ' of any two justices of

the Supreme Court, and the district court of such districts', any two of whom should form a quorum, with the proviso that a district judge should not sit on appeal from his decision, although, if a member of the circuit court, he might 'assign the reasons of such his decision'. The judges, alike of the Supreme Court as of the district courts, were required to swear or affirm that they would 'administer justice without respect to persons, and do equal right to the poor and to the rich', and that they would 'faithfully and impartially discharge and perform all the duties incumbent upon' them according to the best of their 'abilities and understanding agreeably to the Constitution and laws of the United States'.

Exclusive and original jurisdiction of the Supreme Court.

After stating the exclusive jurisdiction of the district courts and the jurisdiction to be exercised concurrently with the courts of the States or of the circuit courts, and stating the jurisdiction of the circuit courts as such, the act provided in its 13th section that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party except between a State and its citizens; and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants as a court of law can have or exercise consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers or in which a consul or vice-consul shall be a party.

Appellate jurisdiction of the Supreme Court.

Passing from the original jurisdiction with which the Supreme Court was vested because of the national or international importance of the cases or parties involved, the act took up the question of appeals from what may be considered, in relation to it, inferior tribunals, providing that 'the Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several States, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States'.

While district and circuit courts were to have exclusive jurisdiction in certain matters and to have 'cognizance, concurrent with the courts of the several States, or the circuit courts', in other cases, it was essential to the success of the more perfect Union that the Supreme Court thereof should ultimately pass upon certain categories of cases arising in an inferior federal court or decided by the court of last resort of the several States involving a federal question. Therefore, the 25th section of the act provided for the re-examination of the decision of the highest court of any of the States in such a case where the decision complained of denied the validity of the act upon which the suit was based.

Power to pass on the validity of legislative acts.

Extension of appellate jurisdiction.

But as the result of experience it was found advisable to amend the act in 1914, in order that the decision of the Supreme Court could be had in federal questions, even although the decision of the State Court was in favour of the federal contention, inasmuch as the judiciary of the United States should, at the request of either party to the litigation, pass upon and finally decide a federal question, whether it arose in a federal or a State court and whether the decision was against or in favour of that contention. The Supreme Court of the United States should pass upon the supreme law of the land.

Provision for employment of counsel.

In the 35th and final section of the Statute of 1789 it was enacted that the parties could themselves plead and manage their cases or appear by counsel or attorneys at law, that in each district ' a meet person learned in the law ' should be appointed ' to act as attorney for the United States in such district ', in order to prosecute ' all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned '. And it was further provided in the same section that there should also be appointed ' a meet person, learned in the law, to act as attorney general for the United States . . . to prosecute and conduct all suits in the Supreme Court in which the United States ' were concerned, ' to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments ' in matters concerning them.

Office of Attorney-General.

Washington's first appointments (1789).

Washington, whether as private citizen, soldier, or president, was punctual in all things, and immediately upon signing the judiciary act he proceeded to organize the Supreme Court, sending to the Senate the name of John Jay of New York for Chief Justice, and for Associate Justices the names of John Rutledge of South Carolina, James Wilson of Pennsylvania, William Cushing of Massachusetts, Robert H. Harrison of Maryland, and John Blair of Virginia ; for attorney general the name of Edmund Randolph of Virginia, and on September 26 these appointments were confirmed.

Washington's views on judicial appointments.

The judiciary was considered the most important branch of the Government of the Union, and it is unquestionably the one which has most amply justified the hopes and expectations of the founders of the Republic, probably because each succeeding President has, it is believed, at least in the case of the Supreme Court, been guided by the sentiments which Washington expressed in a letter, dated July 27, 1789, addressed to his nephew, Bushrod Washington.[1]

You cannot doubt my wishes to see you appointed to any office of honour or emolument in the new government, to the duties of which you are competent ; but however deserving you may be of the one you have suggested, your standing at the bar would not justify my nomination of you as attorney to the federal District Court in preference to some of the oldest and most esteemed general court lawyers in your own State, who are desirous of this appointment. My political conduct in nominations, even if I were uninfluenced by principle, must be exceedingly circumspect and proof against just criticism ; for the eyes of Argus are upon me, and no slip will pass unnoticed, that can be improved into a supposed partiality for friends or relations.[2]

The subject of the judiciary had long been uppermost in Washington's thoughts, and on August 10, before the passage of the judiciary act, he wrote to Madison, then leader of the friends of the Constitution in the House of Representatives, and indeed, it may be said, in the Congress, saying, ' my solicitude for drawing the first characters of the Union into the judiciary is such, that my cogitations on this subject last night, after I parted with you, have almost determined me, as well for the reason just

[1] The education of this young and rising lawyer, destined to become a justice of the Supreme Court under the presidency of John Adams, but not under that of Washington, had been looked after by his distinguished uncle, who, it is interesting to note, had entered him in the law office of James Wilson, one of the first five justices of the Supreme Court. It was natural, therefore, that the ward should write asking whether it would be worth his while ' to solicit the office of attorney in the federal court of this State ', and for his uncle's ' advice about the most proper mode of making application '.

[2] Jared Sparks, *The Writings of George Washington*, 1834–8, vol. x, p. 24.

mentioned, as to silence the clamors, or more properly, soften the disappointment of smaller characters, to nominate Mr. Blair and Colonel Pendleton as associate and district judges, and Mr. Edmund Randolph for the attorney-general, trusting to their acceptance.' And of Mr. Randolph, 'in this character', he said, 'I would prefer to any person I am acquainted with of not superior abilities, from habits of intimacy with him' (*ibid.*, p. 26). Washington, apparently, would have liked to appoint Mr. Edmund Pendleton to the Supreme Court, but he feared that his health would not permit him to 'undertake the duties of an associate under the present form of the act', which required the justices to travel on circuit. But he felt that Mr. Pendleton might be willing to accept the district judgeship if 'the reason of his being preferred to the District Court rather than to the Supreme Court' were explained to him. Although, President Washington added, he had 'no objection to nominating him to the latter, if it is conceived that his health is competent, and his mental faculties are unimpaired by age.[1]

The judiciary as the 'chief pillar' of the national government.

In a letter to his judicial appointees, dated September 30, 1789, Washington thus stated to them his belief that the judiciary was the chief pillar upon which the Government of the more perfect Union must rest:

I experience peculiar pleasure in giving you notice of your appointment to the office of an associate judge in the Supreme Court of the United States.

Considering the judicial system as the chief pillar upon which our national government must rest, I have thought it my duty to nominate for the high offices in that department, such men as I conceived would give dignity and lustre to our national character; and I flatter myself that the love, which you bear to our country, and a desire to promote the general happiness, will lead you to a ready acceptance of the enclosed commission, which is accompanied with such laws as have passed relative to your office.[2]

Chief Justice Jay.

To Jay, whom he had offered any post under the Government he might desire, Washington thus wrote on October 5, 1789:

It is with singular pleasure that I address you as Chief Justice of the Supreme Court of the United States, for which office your commission is enclosed.

In nominating you for the important station, which you now fill, I not only acted in conformity to my best judgement, but I trust I did a grateful thing to the good citizens of these United States; and I have a full confidence, that the love which you bear to our country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge, and integrity, which are so necessary to be exercised at the head of that department, which must be considered as the key-stone of our political fabric.[3]

Attorney-General Randolph.

And to Edmund Randolph, his choice for the Attorney-Generalship, Washington wrote under date of September 27, 1789:

Impressed with a conviction, that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country, and to the stability of its political system. Hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern.

I mean not to flatter when I say, that considerations like these have ruled in

[1] Pendleton, although crippled for life in 1777, was then only 68, was still young enough for the bench, if we are to judge by the experience of the past century, and his experience as President of the Court of Chancery of Virginia from 1777 to 1788 and President of the Virginia Court of Appeals from 1779 until his death in 1803, not to speak of his immense experience as a colonial statesman, would have been of great advantage to the court in its formative stage.

[2] Jared Sparks, *The Writings of George Washington*, vol. x, p. 35. [3] *Ibid.*, pp. 35–6.

the nomination of the attorney-general of the United States, and that my private wishes would be highly gratified by your acceptance of the office. I regarded the office as requiring those talents to conduct its important duties, and that disposition to make sacrifices to the public good, which I believe you to possess and entertain. In both instances I doubt not the event will justify the conclusion. The appointment I hope will be accepted, and its functions, I am assured, will be well performed.[1]

The associate justices.

Of the five justices Messrs. Wilson, Cushing, and Blair permanently accepted; Colonel Harrison declined in order to accept the Chancellorship of Maryland, to which he was unanimously chosen five days after his confirmation as Justice, even although Washington returned his commission in the hope that further consideration might lead to its acceptance, which it did not; and John Rutledge, after acting for a few months, preferred the Chief Justiceship of South Carolina until Washington appointed him Chief Justice of the Supreme Court of the United States, to fill the vacancy caused by the resignation of the office by John Jay to become Governor of New York. The vacancies caused by the refusal of Col. Harrison, a companion in arms of the President, and Rutledge's resignation, were filled, respectively, by the appointment of James Iredell, a distinguished lawyer of North Carolina, and Thomas Johnson of Maryland, likewise a distinguished lawyer of his State and in addition an intimate friend of the President, whose nomination as Commander-in-Chief he had moved many years before in the Continental Congress.

Question whether a State could be sued by an individual in the Supreme Court

There was at least reasonable doubt whether the judicial power of the United States extended generally to cases or controversies between a State and citizens of another State, or only to litigation in which a State was party plaintiff. The Federalist had declared jurisdiction to be without 'a colour of foundation', and John Marshall, defending the Constitution in the Virginia Convention, squarely and unequivocally stated his hope 'that no gentleman will think that a State will be called at the bar of the federal courts. . . . It is not to be supposed that a sovereign power shall be dragged before a Court'.

However this may be, the first suits against States in the Supreme Court of the United States were those in which private citizens of different States were parties plaintiff, and we are prepared for acceptance of jurisdiction of these suits by a court of which John Jay was Chief Justice and James Wilson was the dominating member. For in 1785 Jay had written:

> It is my first wish to see the United States assume and merit the character of one great nation whose territory is divided into different States merely for more convenient government and the more easy and prompt administration of justice, just as our several States are divided into counties and townships for the like purpose.

And Wilson had actually advocated on the floor of the Constitutional Convention the division of the States.[2]

[1] Jared Sparks, *The Writings of George Washington*, vol. x, p. 34. In a note to p. 433, vol. xi, of his edition of the writings of George Washington, Mr. Ford says:

'As early as July 10th Washington had talked with Cyrus Griffin, of the Virginia delegation, on the judiciary and customs appointments in Virginia, and appeared anxious to know if Edmund Pendleton, George Wythe, Lyons, or John Blair would prefer a federal to a State appointment. Edmund Randolph was also suggested, but no mention was made of particular offices for the person to be named. Late in July or early in August, the President wrote to Madison that he had determined to nominate Mr. Blair and Colonel Pendleton as associate and district judges, and Randolph as Attorney-General. . . . Pendleton declined to serve, and Cyrus Griffin was named in his place.'

[2] Gaillard Hunt, *The Writings of James Madison*, 1902, vol. iv, pp. 335–6.

The assumption of jurisdiction, in accord with the letter it may be, but assuredly counter to the spirit of the Constitution, met with an immediate response on the part of the States, for within two days after the decision of the Supreme Court in the case of *Chisholm* v. *Georgia* (2 Dallas, 419), decided on February 18, 1793, the eleventh amendment was proposed to the Congress, formally withdrawing jurisdiction in such cases, a solemn warning to courts of limited jurisdiction to remain within their limits, which has fortunately not been lost upon the Supreme Court in its subsequent career.

settled in the negative by 11th Amendment (1798).

These early cases, however, are of interest, as, in and through them, the procedure was adopted which has since been followed in controversies between States of the Union, and the subsequent cases, in which attempts have been made to circumvent the eleventh amendment by suing an official of the State instead of the State itself, are valuable as showing that a court composed of learned and upright judges can be trusted to keep within the limits of their jurisdiction if they are stated in clear, precise, and unequivocal terms. These two categories of cases are therefore briefly considered before taking up the controversies to which two or more States were unquestionably parties litigant.

As has been said, the first cases in which a State of the Union was sued in the Supreme Court of the United States were brought by individuals, but the exercise of this right, if it existed, caused such an outburst of feeling on the part of the States, and commotion among their people, that the 11th amendment to the Constitution was passed forbidding such suits, which the Supreme Court very wisely interpreted as applying to pending as well as contemplated suits. The first case of a suit of a State against a State was that of *New York* v. *Connecticut* (4 Dallas, 1). It was begun in the very year in which the 11th amendment was proclaimed and became effective. The jurisdiction of the Supreme Court was undoubted in such cases, for the second section of the third article of the Constitution expressly says that ' the judicial Power shall extend . . . to Controversies between two or more States ', and it is common knowledge that the Supreme Court was vested with the jurisdiction conferred upon the courts by the 9th of the Articles of Confederation to create commissions for the trial and decision of suits between the States.

First case of a suit between two States (1799).

Further legislation regarding disputes in which a State is a party (1789).

One further reference is necessary before taking up the controversies themselves. The grant of jurisdiction, full and complete, regarding the States, required legislation to render it effective in practice, which was done by the act of September 24, 1789, of the first Congress of the more perfect union known as the Judiciary Act, of which section 14 reads as follows :

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens ; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

Doubts as to procedure.

In deciding the matter of procedure in the case of *New Jersey* v. *New York* (5 Peters, 284, 291) in the January term of 1831, Mr. Chief Justice Marshall refused to state the procedure to be followed on final hearing, saying :

> But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a state ; the question of proceeding to a final decree will be considered as not conclusively settled until the cause shall come on to be heard in chief.

This remark of the Chief Justice was made in the sixth of the suits between States filed in the Supreme Court, and it was not until the fifteenth suit, that of *Rhode Island* v. *Massachusetts* (4 Howard, 591), decided in 1846, that a final decree was entered in a suit between States.

Gradual development of procedure.

This simple statement is full of meaning and has an importance of its own that can only be obscured by argument. The suit of a State against State in a court of justice was a new proceeding. The lawyers appearing for the States and trying the cases were unfamiliar with procedure, because that procedure was unknown, and was to be developed through the contention of counsel and the decision of the judges in the court room. The judges themselves hesitated to prescribe procedure to be followed, lest they should unwittingly prejudice the rights of the majestic litigants appearing before them. Therefore, counsel and judge felt their way, the one advancing a contention necessary to the consideration of his case, the other prescribing a form of procedure springing from the circumstances, and calculated to do justice in the case under consideration, and calculated not to do injustice in cases otherwise circumstanced, which might one day be presented to the court. The function of the lawyer as an officer of and adviser to the court cannot be displayed to better advantage than in these cases ; the open mind becoming a judge is illustrated by them—simple if between individuals, extraordinary because of the parties to them. They trod together an unknown path ; their successors have not needed to retrace their steps, and the path has led through judicial settlement to international peace.

The Supreme Court apparently recognized the gravity of the questions, but met them fairly and squarely when they presented themselves.

II.

THE SUABILITY OF STATES BY CITIZENS OF OTHER STATES: REASONS FOR THE ELEVENTH AMENDMENT TO THE CONSTITUTION.

First case of suit by an individual against a State—*Oswald* v. *New York* (1792).

In 1792, in the February term of that year, one Oswald, an administrator, began a suit against the State of New York (2 Dallas, 401) ; a writ was issued against the State and placed in the hands of the marshal for service. It was duly served, and counsel moved ' to compel an appearance on the part of the State '. The subsequent proceedings, as far as this special phase of the question is concerned, are stated in the following sentence : ' While, however, the court held the notion under advisement, it was voluntarily withdrawn, and the suit discontinued '.[1] Later in the year, however, counsel appear to have gathered courage, and returned to the charge. The question was again submitted to the court, and it was decided by it, after advisement, that the marshal should serve the summons and make a return of it, as in cases against individuals. Thus, the court ordered, to quote the language of the official report, ' that the marshal of the *New York* district return the writ to him directed in this cause, before the adjournment of this court, if a copy of this rule shall be seasonably served upon him, or his deputy, or, otherwise, on the first day of the next term.'

This was the second step ; the third and final step was taken in the February term of 1793. The summons had been issued, placed in the hands of the marshal,

[1] *Oswald, administrator* v. *State of New York* (2 Dallas, 402).

and apparently served upon the State. The report of the case is very brief, consisting of two paragraphs, and the decision is as weighty as it is brief. Thus, the first paragraph says :

> Proclamation was made in this cause, ' that any person having authority to appear for the State of New-York is required to appear accordingly.' . . .

No person having appeared for the State of New York, counsel for plaintiff moved that judgement be entered by default against the State, which motion was granted by the court, as stated in the second paragraph of the official report :

Decision in *Oswald* v. *New York* (1793).

> Unless the State appears by the first day of next Term to the above suit, or show cause to the contrary, judgment will be entered by default against the state.[1]

That is to say, in these three phases of *Oswald* v. *the State of New York*, the question had been raised and decided that the State could be summoned before the Supreme Court of the United States by a writ served upon a person representing the State, and that, as in suits at common law against an individual, judgement would be entered by default if the State, duly summoned, failed to appear and to litigate the case.

The question of principle was thus settled. It remained, however, to be applied to the facts of a case and a judgement rendered by the court upon the facts as presented. This took place in the same February term of 1793, in the great and leading case of *Chisholm* v. *Georgia* (2 Dallas, 419). The facts of the case material to the present purpose are, that one Chisholm, a citizen of the State of South Carolina, as executor of his testator, likewise a citizen thereof, claimed a certain sum of money as due from the State of Georgia to the estate whereof he was executor ; that, to recover this sum, suit was begun by Chisholm against the State in the Supreme Court of the United States in the August term of 1792. A notice of the action was placed in the hands of the marshal for the Eastern District of Georgia, the notice was served by the marshal of that district upon the Governor and Attorney-General of the State, and, on August 11, 1792, Mr. Edmund Randolph, the first Attorney-General of the United States, made the following motion :

The leading case of *Chisholm* v. *Georgia* (1793).

> That unless the state of *Georgia*, shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said State, on the fourth day of the next Term, or shall then shew cause to the contrary, judgment shall be entered against the said State, and a writ of inquiry of damages shall be awarded.

In order, however, to quote the exact language of the report, ' to avoid every appearance of precipitancy, and to give the State time to deliberate on the measures she ought to adopt, on motion of Mr. *Randolph*, it was ordered by the Court, that the consideration of this motion should be postponed to the present Term '. The case, therefore, came to a hearing in the February term, at which time Messrs. Ingersoll and Dallas, to quote again the report of the case, ' presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause ; but, in consequence of positive instructions, they declined taking any part in arguing the question.' Mr. Randolph, however, on behalf of the plaintiff, made an elaborate argument at the request of the court, covering the points which that august body believed to be involved, and upon which the Judges wished to have the benefit of argument. This part of the case is thus stated in the report :

[1] 2 Dallas, 415.

It has been expressed, as the pleasure of the Court, that the motion should be discussed, under the four following forms :

The four questions for decision.

1*st*. Can the State of *Georgia*, being one of the *United States* of *America*, be made a party-defendant *in any case*, in the Supreme Court of the *United States*, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the State of *South Carolina* ?

2*nd*. If the State of *Georgia* can be made a party defendant in certain cases, does an action of *assumpsit* lie against her ?

3*d*. Is the service of the summons upon the Governor and Attorney General of the State of *Georgia*, a competent service ?

4*th*. By what process ought the appearance of the State of *Georgia* to be enforced ?

In view of the fact that each member of the Supreme Court expressed himself on these subjects in an individual and detailed opinion, in which the question of the suability of a state was considered on principle before the adoption of the Constitution, but in the light of the terms of that now venerable instrument modifying or changing the principle and the practice of courts in this respect, it may not seem to be advisable to analyse Mr. Randolph's argument. However, in addition to its ability, it has an added weight as coming from a man who had himself been a leading member of the Convention which drafted the Constitution and of the Convention of Virginia which ratified it. Some passages will therefore be quoted from his argument.[1]

Argument of Attorney-General Randolph for the plaintiff.

In the first place, he said :

Text of the Constitution.

The Constitution and the Judicial Law are the sources from which the jurisdiction of the Supreme Court is derived. The effective passages in the Constitution are in the second section of the third article. ' The judicial power shall extend to controversies between a State and citizens of another State.' ' In cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.' The judicial act thus organizes the jurisdiction, delineated by the Constitution. ' The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens ; and except, also, between a State and citizens of other States and aliens, in which latter case, it shall have original, but not exclusive jurisdiction.'

Upon this basis we contend :

1*st*. That the Constitution vests a jurisdiction in the Supreme Court over a State, as a defendant, at the suit of a private citizen of another State.

2*d*. That the judicial act recognizes that jurisdiction.

The Constitution, he contended, vests the Supreme Court with jurisdiction of a suit against a State brought by a private citizen of another State for two reasons : first, according to the letter ; and, second, according to the spirit of the Constitution. The judicial power, he reasons, is extended to controversies between a State and citizens of another State.

Omitting the argument that might be drawn from the use of the word ' between ', he passes to the paragraph of the Constitution in which it is said that the Supreme Court has original jurisdiction in cases in which a State shall be a party, and that a State is a party whether it is plaintiff or defendant. A controversy between A B and C D would, he said, appear to be between C D and A B. Had it been the intention of the framers of the Constitution to limit the Supreme Court to original

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419–41).

jurisdiction of a suit by a State against a citizen of another State they might have done so, but they did not. On this point Mr. Randolph says :

> Nay, the opportunity fairly occurs, in two pages of the judicial article, to confine suits to States, as plaintiffs, but they are both neglected, notwithstanding the consciousness which the convention must have possessed, that the words, unqualified, strongly *tended*, at least, to subject States as defendants.

Spirit of the Constitution.

Mr. Randolph next contends that, in addition to the letter, the spirit of the Constitution is with his interpretation. To make this assertion good, he quotes the various instances from the Constitution in which the actions of States are to be annulled ; 'and thus', he says, 'is announced to the world the probability, but certainly the apprehension, that States may injure individuals in their property, their liberty, and their lives ; may oppress sister States ; and may act in derogation of the general sovereignty.' If acts of this kind are committed affecting citizens of other States, the States are to be called to account. 'Are States,' he says, 'then to enjoy the high privilege of acting thus eminently wrong, without controul ; or does a remedy exist? . . . The common law has established a principle, that no prohibitory act shall be without its vindicatory quality ; or, in other words, that the infraction of a prohibitory law, although an express penalty be omitted, is still punishable. Government itself would be useless, if a pleasure to obey or transgress with impunity, should be substituted in the place of a sanction to its laws.' After admitting that actions of the State 'may be annihilated', he says :

> But this redress goes only half way ; as some of the preceding unconstitutional actions must pass without censure, unless States can be made defendants.

After enumerating further actions of the State which affect individuals, he thus continues :

> These evils, and others which might be enumerated like them, cannot be corrected, without a suit against the State. It is not denied, that one State may be sued by another ; and the reason would seem to be the same, why an individual, who is aggrieved, should sue the State aggrieving. A distinction between the cases is supportable only on a supposed comparative inferiority of the Plaintiff. But the framers of the Constitution could never have thought thus. They must have viewed human rights in their essence, not in their mere form. They had heard, seen—I will say, felt ; that Legislators were not so far sublimed above other men, as to soar beyond the region of passion. Unfledged as *America* was in the vices of old Governments, she had some incident to her own new situation : individuals had been victims to the oppression of States.

The Court and the sovereignty of States.

Mr. Randolph now reaches a stage in his argument of a more general nature, one of interest to his countrymen then and now, and one of interest to those who would like to see an international court established for the society of nations, but who fear the effect which its creation and a resort to it might have upon the sovereignty of the States creating it. Referring to his contentions, he thus cites in support of them three lines of argument of general interest :

> These doctrines are moreover justified : 1*st*. By the relation in which the States stand to the Federal Government : and, 2*d*. By the law of nations, on the subject of suing sovereigns : and, 3*d*. They are not weakened by any supposed embarrassment attending the mode of executing a decree against a State.

Mr. Randolph to his finger-tips believed in the sovereignty of the States, and he would have been as unwilling to contend in court that they were not sovereign as he was unwilling to admit that they were not so in the Federal Convention in Philadelphia or in the Convention of his State. His views, therefore, on this phase of the subject were of great moment to him as they are of interest now, and his exact language on this point is quoted lest his views and his statement of them be misapprehended :

Relation of the States to the Union.

I acknowledge, and shall always contend, that the States are sovereignties. But with the free will, arising from absolute independence, they might combine in Government for their own happiness. Hence sprang the confederation ; under which indeed, the States retained their exemption from the forensic jurisdiction of each other, and except under a peculiar modification, of the *United States* themselves. Nor could this be otherwise ; since such a jurisdiction was nowhere (according to the language of that instrument) *expressly* delegated. This Government of supplication cried aloud for its own reform ; and the public mind of *America* decided, that it must perish of itself, and that the Union would be thrown into jeopardy, unless the energy of the general system should be increased. Then it was, the present Constitution produced a new order of things. It derives its origin immediately from the people ; and the people individually are, under certain limitations, subject to the legislative, executive, and judicial authorities thereby established. The States are, in fact, assemblages of these individuals who are liable to process. The limitations, which the Federal Government is admitted to impose upon their powers, are diminutions of sovereignty, at least equal to the making of them defendants. It is not pretended, however, to deduce from these arguments alone, the amenability of States to judicial cognizance ; but the result is, that there is nothing in the nature of sovereignties, combined as those of America are, to prevent the words of the Constitution, if they naturally mean, what I have asserted, from receiving an easy and usual construction.

In further support of these views, Mr. Randolph takes a concrete case, which is not without interest at the present day, showing the process by which a denial of justice on the part of a State toward a citizen of a foreign State might lead to war and showing, at the same time, that an appeal to a court of law, whether it be of the United States or of the society of nations, would in such a case preserve the peace unbroken :

In certain cases only the judicial power can preserve peace.

But pursue the idea a step further ; and trace one, out of a multitude of examples, in which the General Government may be convulsed to its centre without this judicial power. If a State shall injure an individual of another State, the latter must protect him by a remonstrance. What if this be ineffectual ? To stop there would cancel his allegiance ; one State cannot sue another for such a cause ; aquiescence is not to be believed. The crest of war is next raised ; the Federal head can not remain unmoved amidst these shocks to the public harmony. Ought then a *necessity* to be created for drawing out the general force on an occasion so replete with horror ? Is not an adjustment by a judicial form far preferable ? Are not peace and concord among the States, two of the great ends of the Constitution ? To be consistent, the opponents of my principles must say, that a State may not be sued by a foreigner.—What ? Shall the tranquillity of our country be at the mercy of every State ? Or, if it be allowed, that a State may be sued by a foreigner, why, in the scale of reason, may not the measure be the same, when the citizen of another State is the complainant ?

After adverting to the classic examples of the Amphictyonic Council and of the Achaean League, and to the Holy Roman Empire as it then existed, in which

suits might be and apparently were brought against states, without, however, vouching them as precedents for the present action—he concluded that it would be ' no degradation of sovereignty, in the States, to submit to the Supreme Judiciary of the United States ' and, we might say, to the supreme court of the society of nations.

The question of execution.

Omitting Mr. Randolph's very brief and inadequate reference to the law of nations on this subject, we come to the 'embarrassment attending the mode of executing a decree against a state'. Mr. Randolph admitted that no attempt had been made to define a form of execution against a state. He admitted that a form of execution might be necessary and that, if necessary, it would come into being. His language on this point is interesting, as showing that the subject of judicial execution had not been considered by the delegates of the states that framed and ratified the Constitution. ' Executions ', he said, ' for one State against another, are writs not specially provided for by statute, and are necessary for the exercise of the jurisdiction of the Supreme Court, in a contest between States ; and although, in neither the common law, nor any statute, the form of such an execution appears ; yet it is agreeable to the principles and usages of law, that there should be a mode of carrying into force a jurisdiction, which is not denied. If, then, the Supreme Court may create a mode of execution, when a State is defeated at law by a State, why may not the same means be exerted, where an *individual* is successful against a State ? '

Having thus stated his belief that execution might be necessary, he puts and thus attempts to answer the following question :

But what species of execution can be devised ? This, though, a difficult task, is not impracticable. And if it were incumbent on me to anticipate the measures of the Court, I would suggest these outlines of conduct. First, that if the judgment be for the specific thing, it may be seized : or, secondly, if for damages, such property may be taken, as, upon the principles, and under the circumstances cited from *Bynkershoek*, would be the ground-work of jurisdiction over a foreign *Prince*.

Mr. Randolph felt, however, that the subject was very delicate ; and he was by no means sure of his remedy. Therefore, he ended with the very sensible comment that ' However, it is of no consequence, whether the conjectures be accurate or not ; as a correct plan can doubtless be discovered.'

As a believer in the sovereignty of the States, he foresaw that these sovereigns of the union might attempt to exercise their sovereignty in opposing even a correct plan, and thus addressed himself to this phase of the subject :

The possibility of resistance.

Still, we may be pressed with the final question : ' What if the State is resolved to oppose the execution ?' This would be an awful question indeed ! He, to whose lot it should fall to solve it, would be *impelled* to invoke the god of wisdom to illuminate his decision. I will not believe that he would recall the tremendous examples of vengeance, which in past days have been inflicted by those who claim, against those who violate, authority. I will not believe that in the wide and gloomy theatre, over which his eye should roll, he might perchance catch a distant glimpse of the Federal arm uplifted. Scenes like these are too full of horror, not to agitate, not to rack, the imagination. But at last we must settle on this result ; there are many *duties*, precisely defined, which the States must perform. Let the remedy which is to be administered, if these should be disobeyed, be the remedy of the occasion, which we contemplate. The argument requires no more to be said : it surely does not require us to dwell on such painful possibilities. Rather, let me

hope and pray, that not a single star in the *American* Constellation will ever suffer its lustre to be diminished, by hostility against the sentence of a Court, which itself has adopted.

Mr. Randolph felt, however, that the judgement of the court should be rendered, even although the question of execution might be doubtful. He did not invoke the 'decent respect to the opinions of mankind', although, as a statesman of the Revolutionary period, these words doubtless rang in his ears. Thus, he continues:

But, after all, although no mode of execution should be invented, why shall not the Court proceed to judgment? It is well known, that the courts of some States have been directed to render judgment, and there stop; and that the Chancery has often tied up the hands of the common law, in like manner. Perhaps, if a Government could be constituted without mingling at all the three orders of power, Courts should, in strict theory, only declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the Executive. But that any State should refuse to conform to a solemn determination of the Supreme Court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact, and character.

On this phase of the subject, which is the only one of present and permanent interest, Mr. Randolph said, in conclusion:

Combine them into one view, the letter and the spirit of the Constitution; the relation of the several States to the Union of the States; the precedents from other sovereignties; the judicial act; and process act; the power of forming executions; the little previous importance of this power to that of rendering of judgment; the influence under which every State must be to maintain the general harmony; and the inference, will, I trust, be in favor of the first proposition; namely, that a State may be sued by the citizens of another State.

The case was regarded by the Justices as a very important one. They held it under advisement, the official report says, 'from the 5th to the 18th of *February*, when they delivered their opinions *seriatim*.' Following the English practice, they began with the judge last appointed and ended with the Chief Justice.

Dissenting opinion of Mr. Justice Iredell against the plaintiff's claim.

In the introduction to his opinion, Mr. Justice Iredell calls attention to the fact, which cannot be too often mentioned, that the Supreme Court, being a court of limited jurisdiction, must determine, before entertaining the case, whether it can properly exercise jurisdiction and whether the defendant State concedes or contests jurisdiction. Thus, he says:

This is the first instance wherein the important question involved in this cause has come regularly before the Court. In the *Maryland* case, it did not, because the Attorney-General of the State voluntarily appeared. We could not, therefore, without the greatest impropriety, have taken up the question suddenly. That case has since been compromised; but had it proceeded to trial, and a verdict been given for the Plaintiff, it would have been our duty, previous to our giving judgment, to have well considered whether we were warranted in giving it. I had then great doubts upon my mind, and should on such a case, have proposed a discussion of the subject. Those doubts have increased since, and after the fullest consideration, I have been able to bestow on the subject, and the most respectful attention to the able argument of the Attorney-General, I am now decidedly of opinion that no such action as this before the Court can legally be maintained.[1]

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 429–30).

The attorney-general, in arguing the case, considered the question to be whether a State of the American Union could or could not be sued by a citizen of another State, and while he argued the particular form of action, namely, *assumpsit*—which, for present purposes, may be said to be an action in which a State is presumed to promise to pay an indebtedness—he felt that the form in which a State should be sued was a minor matter, as, if suable, the appropriate form of action could be found. He expressed a decided opinion that the action of *assumpsit* would lie, but, believing that the case turned upon the suability of the State, he did not attempt to prove in detail that this particular action could be brought. In other words, he considered the smaller as included in the larger question and that it rose and fell with it. Not so Mr. Justice Iredell, who, approaching the question as a lawyer and as a judge, and not wishing to go beyond the exact question submitted for decision, devoted his attention to the narrower question, whether *assumpsit* would lie against a State—for, if he found that it would not, it became, in his opinion, unnecessary to consider the larger question, whether a State could be sued, inasmuch as the rejection of this form of action would decide the particular case submitted. From this point of view, the suability of the State as such, or as an abstract question, became an incident. Yet he himself felt it necessary to consider this question, although he regarded it as secondary, because, if a State could be sued, the case would arise again in some other form of action or at some subsequent time. He was therefore obliged to consider both phases of the question; but, differing from the Attorney-General, he preferred to consider it as the lawyer and the judge, rather than as the publicist or the statesman.

Does the action of *assumpsit* lie against a State?

As this point of view is so important, and as it determines the nature and extent of Mr. Justice Iredell's opinion, his language on this point is quoted. Thus, he says:

> The action is an action of *assumpsit*. The particular question then before the Court, is, will an action of *assumpsit* lie against a State? This particular question (abstracted from the general one, viz. Whether, a State can in any instance be sued?) I took the liberty to propose to the consideration of the Attorney-General, last term. I did so because I have often found a great deal of confusion to arise from taking too large a view at once, and I had found myself embarrassed on this very subject, until I considered the abstract question itself. The Attorney-General has spoken to it, in deference to my request, as he has been pleased to intimate, but he spoke to this particular question slightly, conceiving it to be involved in the general one; and after establishing, as he thought, that point, he seemed to consider the other followed of course. He expressed, indeed, some doubt how to prove what appeared so plain. It seemed to him (if I recollect right), to depend principally on the solution of this simple question; can a state Assume? But the Attorney-General must know, that in England, certain judicial proceedings, not inconsistent with the sovereignty, may take place against the Crown, but that an action of *assumpsit* will not lie. Yet surely the King can assume as well as a State. So can the *United States* themselves, as well as any State in the Union; yet the Attorney-General himself has taken some pains to shew, that no action whatever is maintainable against the *United States*. I shall, therefore, confine myself, as much as possible, to the particular question before the Court, though every thing I have to say upon it will affect every kind of suit, the object of which is to compel the payment of money by a State.[1]

After thus stating the method of procedure which he proposed to follow, the learned justice—and in his case the appellation was clearly deserved—remarked that, if an action of *assumpsit* lies against a State 'it must be in virtue of the Constitution

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 430).

of the *United States*, and of some law of *Congress* conformable thereto'. The authority in the Constitution he finds in Article III, section 2, concerning the judicial power, and, after analysing it, he thus states it in terms sufficient for present purposes:

The Constitution, therefore, provides for the jurisdiction wherein a State is a party, in the following instances: 1*st*. Controversies between two or more states: 2*d*. Controversies between a State and citizens of another State: 3*d*. Controversies between a State, and foreign States, citizens or subjects. And it also provides, that in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.[1]

So much for the Constitution. Next, as to the law of Congress, for, without an Act of Congress the court could not be constituted and could not exercise jurisdiction. The act to which he refers is the Judiciary Act of 1789, giving effect to the judicial power of the United States, an act drafted by Oliver Ellsworth, then a senator from Connecticut and destined to be Chief Justice of the Supreme Court organized in accordance with the act whereof he was sponsor. Article 13 of this act, to which Mr. Justice Iredell refers, is thus worded:

That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party except between a State and its citizens; and except also, between a State and citizens of other States, or aliens, in which latter case it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all jurisdiction of suits or proceedings against Ambassadors or other public Ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by Ambassadors, or other public Ministers, or in which a Consul or Vice-Consul shall be a party.

On this text, Mr. Justice Iredell thus comments:

The supreme Court, hath, therefore, FIRST, *exclusive* jurisdiction in every controversy of a civil nature: 1*st*. Between two or more States; 2*d*. Between a State and a foreign State; 3*d*. Where a suit or proceeding is depending against Ambassadors, other public ministers, or their domestics or domestic servants. SECOND, *original*, but not exclusive jurisdiction, 1*st*. Between a State and citizens of other States: 2*d*. Between a State and foreign citizens or subjects: 3*d*. Where a suit is brought by Ambassadors or other public ministers: 4*th*. Where a consul or vice-consul, is a party. The suit now before the Court (if maintainable at all) comes within the latter description, it being a suit against a State by a citizen of another State.

After calling attention to the use of the word 'controversies' as eliminating from the jurisdiction of the court suits of a criminal nature—a distinction then first taken and held by the Supreme Court to the present day—the learned justice comes to the heart of the question and discloses his attitude upon it: that the exercise by the court of the jurisdiction with which it is vested by the Constitution must be either in pursuance of antecedent law or of law to be created by the Congress; that, in the absence of a particular law of this kind, the common law of England, in the minds and on the lips of the framers, is to be the measure of the jurisdiction and the rule for its exercise, unless there is an Act of Congress prescribing a different rule, which, according to the learned justice, the Congress had not done.

Reference to the English Common Law.

The question, therefore, is still further narrowed, and may thus be stated: Could the crown be sued at common law; or, rather, if the question is still narrower,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 431).

would an action of *assumpsit* lie against the crown ? Finding that the action would not lie, and finding that there was no act of Congress varying this rule of common law, the learned justice held that the action of *assumpsit* would not lie against the State of Georgia, which had succeeded to the rights of the crown and could not be deprived of those rights except by a specific provision of the Constitution of the United States—which the delegates of Georgia took part in framing, and which as a state it ratified—or by a statute of the State renouncing its right of immunity from suit. 'What controversy', he asks, 'of a civil nature can be maintained against a State by an individual ?' To which he replies :

> The framers of the Constitution, I presume, must have meant one of two things. Either, 1. In the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself), to refer to antecedent laws for the construction of the general words they use : or, 2. To enable *Congress* in all such cases to pass all such laws, as they might deem necessary and proper to carry the purposes of this Constitution into full effect, either absolutely at their discretion, or at least in cases where prior laws were deficient for such purposes, if any such deficiency existed.

The learned justice made it clear that, in his opinion, the intervention of Congress was necessary in order to establish the court, to appoint its judges, and to define its procedure ; for, without this intervention, it would not be constituted and it would have no procedure to follow. In justification of these views, he referred to the general authority of Congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the Constitution ; and he considered Congress supreme in this matter, provided that it did not exceed its authority ; for the law inconsistent with the Constitution would be null and void, inasmuch as it would be inconsistent with the fundamental and paramount law of the land. 'Subject to this restriction,' he says, 'the whole business of organizing the Courts, and directing the methods of their proceeding where necessary, I conceive to be in the discretion of *Congress*. If it shall be found, on this occasion, or on any other, that the remedies now in being are defective, for any purpose it is their duty to provide for, they no doubt will provide others. It is their duty to *legislate*, so far as is necessary to carry the Constitution into effect. It is *ours* only to judge. . . . There is no part of the Constitution that I know of, that authorizes this Court to take up any business where they left it, and, in order that the powers given in the Constitution may be in full activity, supply their omission by making *new laws* for *new cases* ; or, which I take to be the same thing, applying *old principles* to *new cases* materially different from those to which they were applied before.'[1]

The Court must not legislate.

The learned justice did not believe that the Supreme Court should be considered as an exception. Indeed, he expressly says that the judges of the court had no right to constitute themselves 'an *officina brevium*, or take any other short method of doing what the Constitution has chosen . . . should be done in another manner'. What this manner is is made clear by a passage from the 14th section of the Judiciary Act, which he quotes :

> All the before-mentioned Courts of the *United States* shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 433).

by statute, which may be necessary for the exercise of their respective jurisdictions, *and agreeable to the principles and usages of law*.[1]

The procedure of the Court must conform to the principles and usages of law.

The meaning of this is clear. The Congress meant the courts of the United States to have the power to issue certain writs specifically mentioned, and all others not so mentioned necessary for the execution of the powers confided to the federal judiciary; but such writs were to be agreeable to, that is to say, in accordance with, the principles and usages of law. The Congress might have defined the sense in which the expressions 'principles and usages of law' were to be understood, and doubtless the Congress would have done so had it been intended to modify the sense in which these principles and usages were to be understood. Congress did not do so, and, failing this, the principles and usages of law are to be taken in the sense in which they were understood at the time of the passage of the act. To use an illustration of an international character, the Congress is given the power 'to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations'. It did not specifically define piracy but referred to it as defined by the law of nations; and in the leading case of *U. S.* v. *Smith* (5 Wheaton, 153), decided in 1820, Mr. Justice Story, speaking for the Court, held that the reference was sufficient. In the same way, Congress has the right to define the sense in which the law of nations is to be understood. It has not done so, and the law of nations is accepted and applied by the Supreme Court in the sense in which that system of jurisprudence is generally understood—as has been stated for a hundred years and more, and nowhere more confidently or authoritatively than in the case of the *Paquete Habana* (175 U.S. 677, 700), decided in 1900, in which Mr. Justice Gray, speaking for the court, said:

The Law of Nations in the Supreme Court.

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Authority of the English Common Law in America.

The principles and usages which the Congress had in mind were the principles and usages of that system of law with which its members were familiar, and that system was then, and in large part still is, the common law of England—for which statement it would be mere pedantry to quote from decisions of the Supreme Court of the United States or even to cite authority. Instead of an adjudged case, an instructive incident may be referred to. During the conference of the American States, which was indifferently called the Federal or Constitutional Convention, a doubt appears to have arisen as to the sense in which the term *ex post facto* was to be understood, inasmuch as the States were renouncing the right to pass *ex post facto* laws. Mr. John Dickinson, an enlightened statesman and a sound lawyer, brought to the Convention the book containing the principles and usages of the law as they were expounded by their master and as the members of the convention had learned them, mastered them, and later applied them, as lawyers, legislators,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 434).

and judges. The book from which John Dickinson read was none other than Blackstone's *Commentaries*, the 7th edition of which—the one which we regard as possessing authority—appeared in 1775, and of which work Burke said more copies were sold in the plantations than in the mother country.[1]

Fortified by the act of Congress prescribing the principles and usages of law, and understanding the sense in which Ellsworth, as a framer of the Constitution, would necessarily interpret the phrase, Mr. Justice Iredell held that the action of *assumpsit* would, in the absence of a specific provision to the contrary, lie only in those cases in which it could properly be brought in the system of common law with which American statesmen and jurists were familiar; and he further held that, unless changed by the Constitution, a suit would not lie against a State except with its consent, as action only lay against the crown by petition, not as of right. But the learned justice is entitled to speak for himself. Referring to the clause in question, he says:

> Whatever writs we issue, that are necessary for the exercise of our jurisdiction, must be *agreeable to the principles and usages of law*. This is a direction, I apprehend, we cannot supercede, because it may appear to us not sufficiently extensive. If it be not, we must wait until other remedies are provided by the same authority. From this it is plain, that the Legislature did not chuse to leave to our own discretion the path to justice, but has prescribed one of its own. In doing so, it has, I think, wisely, referred us to principles and usages of law already well known, and by their precision calculated to guard against that innovating spirit of Courts of justice. . . . The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the special words I have above cited, from the judicial act, I apprehend, can be, either, 1*st*. Those of the particular laws of the State, against which the suit is brought. Or 2*d*. Principles of law common to all the States.[2]

After saying that there was, at the time of the Constitution, no law in any of the States varying the general principle, he considers himself justified in using the following language:

Previous law in the States.

> I believe there is no doubt that neither in the State now in question, nor in any other in the *Union*, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed. Since that time, an act of assembly for such a purpose has been passed in *Georgia*. But that surely could have no influence in the construction of an act of the Legislature of the *United States*, passed before.[3]

There being no law of Georgia permitting a suit of the kind specified when the Constitution was drafted and when it was ratified by Georgia and by the other States of the newer and more perfect Union, Mr. Justice Iredell dismissed further consideration of what he was pleased to call particular principles and thus adverted to the nature and effect of those general principles common to all the States:

> The only principles of law, then, that can be regarded, are those common to all the States. I know of none such, which can affect this case, but those that are

[1] Mr. Dickinson mentioned to the House that on examining Blackstone's *Commentaries* he found that the term 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite. (Session of August 29, 1787; Gaillard Hunt, *The Writings of James Madison*, vol. iv, p. 325.)

[2] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 434).

[3] *Ibid.* (2 Dallas, 419, 434–5).

derived from what is properly termed ' the common law ', a law which I presume is the ground-work of the laws in every State in the *Union*, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controls it, to be in force in each State, *as it existed in England* (*unaltered by any statute*), *at the time of the first settlement of the country*. The statutes of *England* that are in force in *America* differ perhaps in all the States ; and, therefore, it is probable the common law in each is in some respects different. But it is certain that in regard to any common law principle which can influence the question before us, no alteration has been made by any statute, which could occasion the least material difference, or have any partial effect. No other part of the common law of *England*, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the *Union*, in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as compleately sovereign, as the *United States* are in respect to the powers surrendered. The *United States* are sovereign as to all the powers of Government actually surrendered ; each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United States* have no claim to any authority but *such as the States have surrendered to them* : of course the part not surrendered must remain as it did before. The powers of the general Government, either of a Legislative or Executive nature, or which particularly concerns Treaties with Foreign Powers, do for the most part (if not wholly) affect individuals, and not States : they require no aid from any State authority. This is the great leading distinction between the old articles of confederation, and the present Constitution. The judicial power is of a peculiar kind. It is indeed commensurate with the ordinary Legislative and Executive powers of the general government, and the Power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the *United States* may pass all laws necessary to give such Judicial Authority its proper effect. So far as States, under the Constitution, can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the *United States*, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a State is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a State *can* be a party ; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by a reference either to pre-existent laws, or laws passed under the constitution and in conformity to it.[1]

Nature of State Sovereignty.

Leaving this phase of the subject, Mr. Justice Iredell advances a technical reason, very hard to meet and overcome, against the right of a citizen of a state of the Union to sue another state thereof. The reason to which reference is made is that, while in other instances the Supreme Court had original and exclusive jurisdiction, the Supreme Court has, by express provision of the Judiciary Act, only concurrent jurisdiction, which Mr. Justice Iredell interprets as meaning that suit could only be brought in the Supreme Court where it would lie in a State court. As concurrent jurisdiction mentioned in the act is, in his opinion, jurisdiction to be indifferently or concurrently exercised in the State or Federal court, and inasmuch as the State

Technical arguments.

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 435–6).

could not be sued in a State court by an individual, it could not be sued in the Supreme Court of the United States, for the jurisdiction in this case would not be concurrent. Thus, he says :

It is observable, that in instances like this before the Court, this Court hath a *concurrent jurisdiction* only ; the present being one of those cases where, by the judicial act, this Court hath *original* but not *exclusive* jurisdiction. This Court, therefore, under that act, can exercise no authority, in such instances, but such authority as from the subject matter of it, may be exercised in some other Court.— There are no Courts with which such a concurrence can be suggested but the Circuit Courts, or Courts of the different States. With the former, it cannot be, for admitting that the Constitution is not to have a restrictive operation, so as to confine all cases in which a State is a party, exclusively to the Supreme Court (an opinion to which I am strongly inclined), yet, there are no words in the definition of the powers of the Circuit Court, which give a colour to an opinion, that where a suit is brought against a State by a citizen of another State the Circuit Court could exercise any jurisdiction at all. If they could, however, such a jurisdiction, by the very terms of their authority, could be only concurrent with the Courts of the several States. It follows, therefore, unquestionably, I think, that looking at the act of *Congress*, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted), we can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed.[1]

Mr. Justice Iredell's opinion is clearly stated in the passage just quoted, but he removes any doubt which might exist in the succeeding paragraph, a portion of which is quoted :

If, therefore, no new remedy be provided (as plainly is the case), and consequently, we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force until superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution (which period, or the period of passing the law, in respect to the object of this enquiry, is perfectly equal) an action of the nature like this before the Court could have been maintained against one of the States in the *Union*, upon the principles of the common law, which I have shown to be alone applicable. If it could, I think, it is now maintainable here : if it could not, I think, as the law stands at present, it is not maintainable ; whatever opinion may be entertained, upon the construction of the Constitution as to the power of *Congress* to authorize such a one.[2]

The 'Petition of Right' in English law.

After having laid down this broad, general principle, he next proceeds to show that the crown could not be sued as of right, but that it could only be petitioned, even although the petition itself might be considered as a matter of right. Upon the separation of the State from Great Britain it became sovereign and succeeded to the rights of the crown. This statement Mr. Justice Iredell had previously made ; and it was not necessary for him to argue it, as the second of the Articles of Confederation recognized and stated the sovereignty of the states forming the Confederation. On the particular question at hand Mr. Justice Iredell said :

Now I presume it will not be denied, that in every State in the *Union*, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 436–7). [2] *Ibid.* (2 Dallas, 419, 437).

were those which, in *England* apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this Constitution could, in any manner, or upon any colour, apply to the case of a claim against a State, in its own Courts, where it was solely and completely sovereign in respect to such cases at least. Whether that remedy was strictly applicable or not, still I apprehend there was no other. The only remedy, in a case like that before the Court, by which, by any possibility, a suit can be maintained against the crown, in *England*, or could be at any period from which the common law, as in force in *America*, could be derived, I believe is that which is called a *Petition of right*.[1]

The learned justice here takes up and considers the nature of a petition of right, examines its origin, its nature, and its application, analyses its precedents and quotes the following passage from the first volume of Blackstone's *Commentaries*:

If any person has, in point of property, a just demand upon the *King*, he must petition him in his Court of Chancery, where his Chancellor will administer right, as a matter of grace, though not upon compulsion. . . . And this is exactly consonant to what is laid down by the writers on natural law.—A subject, says *Puffendorf*, so long as he continues a subject, hath no way to *oblige* his *Prince* to give him his due when he refuses it; though no wise *Prince* will ever refuse to stand to a lawful contract. And if the *Prince* gives the subject leave to enter an action against him upon such contract, in his own Courts, the action itself proceeds rather upon natural equity, than upon the municipal laws. For the end of such action is not to *compel* the *Prince* to observe the contract, but to *persuade* him.

After stating that the petition is to the person of the king, and that it is for the king 'to indorse or to underwrite *soit droit fait al partie* (let right be done to the party)', and that 'upon which, unless the Attorney-General confesses the suggestion, a commission is issued to enquire into the truth of it', Mr. Justice Iredell states his opinion:

But in all cases of petition of right, of whatever nature is the demand, I think it is clear beyond all doubt, *that there must be some indorsement or order of the King himself, to warrant any further proceedings*. The remedy, in the language of *Blackstone*, being a *matter of grace* and not *on compulsion*.[2]

In a previous portion of his opinion, the learned justice had pointed out that the petition of right in matters of revenue lay in the exchequer, that the common-law courts of England could not issue a writ to the treasury, and that 'consequently, no such remedy could, under any circumstances, I apprehend, be allowed in any of the *American* States, in none of which it is presumed any Court of Justice hath any express authority over the revenues of the State as has been attributed to the Court of Exchequer in *England*'.[3]

As the result of his examination of the principles and usages of law in this matter, Mr. Justice Iredell ends this part of his opinion, which is in the nature of a closely reasoned argument:

Thus, it appears, that in *England*, even in the case of a private debt contracted by the *King*, in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise there can be no proceeding upon it. If the debts contracted be avowedly for the public uses of Government, it is at least doubtful whether that remedy will lie, and if it will, it remains afterwards in the power of Parliament to provide for it or not among the current supplies of the year.[4]

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 437).
[2] *Ibid.* (2 Dallas, 419, 444).
[3] *Ibid.* (2 Dallas, 419, 439).
[4] *Ibid.* (2 Dallas, 419, 445).

Cases of debts due from a State.

Mr. Justice Iredell next considers the cases in which a debt can be due from a State, and finds them to be three in number, two of which are contracted by the legislature and the third by the Executive or Governor without authority of the legislature. In the first two cases where a debt has been created by the legislature or by an executive or other person deriving authority from the legislature, he says that a suit will not lie against the legislature, just as a suit never lay against the parliament. And in the case of a debt contracted by the governor without special authority, the State cannot be liable in any form. Thus, he says :

Now, let us consider the case of a debt due from a State. None can, I apprehend, be directly claimed but in the following instances. 1*st*. In case of a contract with the Legislature itself. 2*d*. In case of a contract with the Executive, or any other person, in consequence of an express authority from the Legislature. 3*d*. In case of a contract with the Executive, without any special authority. In the *first* and *second* cases, the contract is evidently made on the public faith alone. Every man must know that no suit can lie against a Legislative body. His only dependence therefore can be, that the Legislature on principle of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the Legislature may incur, the case is certainly without remedy in any of the Courts of the State. It never was pretended, even in the case of the crown in *England*, that if any contract was made with Parliament, or with the crown, by virtue of an authority from Parliament, that a Petition to the crown would in such case lie. In the *third* case, a contract with the Governor of a State, without any special authority. This case is entirely different from such a contract made with the crown in *England*. The crown there has very high prerogatives, in many instances, is a kind of trustee for the public interest, in all cases represents the sovereignty of the *Kingdom, and is the only authority which can sue or be sued in any manner on behalf of the Kingdom, in any Court of Justice.* A Governor of a State is a mere Executive officer ; his general authority very narrowly limited by the Constitution of the State ; with no undefined or disputable prerogatives ; without power to affect one shilling of the public money, but as he is authorized under the Constitution, or by a particular law ; having no colour to represent the sovereignty of the State, so as to bind it in any manner to its prejudice, unless specially authorized thereto.[1]

Position of the Governor.

If the status of the governor is accurately described by the learned justice—and nobody in this country, not even a Governor, can pretend that he is the successor of the prerogatives of the crown other than as such prerogatives are vested in him by the Constitution or the law of his State—the conclusion which Mr. Justice Iredell draws therefrom seems to be as inevitable as it is logical :

And therefore all who contract with him do it at their own peril, and are bound to see (or take the consequence of their own indiscretion) that he has strict authority for any contract he makes. Of course such contract when so authorized will come within the description I mentioned of cases where public faith alone is the ground of relief, and the Legislative body, the only one that can afford a remedy, which, from the very nature of it must be the effect of its discretion, and not of any compulsory process. If however any such cases were similar to those which would entitle a party to relief by petition to the *King*, in *England*, that Petition being only presentable to him, as he is the sovereign of the *Kingdom*, so far as analogy is to take place, such Petition in a State could only be presented to the sovereign power, which surely the Governor is not. The only constituted authority to which such an application could with any propriety be made, must undoubtedly be the Legislature, whose express

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 446).

consent, upon the principle of analogy, would be necessary to any further proceeding. So that this brings us (though by a different route) to the same goal ; *The discretion and good faith of the Legislative body.*[1]

With this statement Justice Iredell might properly have ended his opinion, because, having shown that *assumpsit* would not lie against a State, and that, in his opinion, the only remedy was the good faith of the legislature, which could not be sued though it might be petitioned, the Supreme Court could not take jurisdiction, and, *a fortiori*, could not render judgement against the State in the case of *Chisholm* v. *Georgia*. But, feeling that the State might be regarded as a body politic, and that an attempt might be made to sue it in its corporate capacity by applying to it the principles and usages of law, which allowed a corporation to be sued, he passed to a consideration of the States of the American Union, although the Attorney General had, in his argument, expressly waived the applicability to the case of the doctrine of corporations. On the threshold of his argument the learned justice warns against forcing analogies to the breaking point and applying acknowledged principles and usages of law to situations resembling the law in name but not in fact. For, in the broad sense of the word, any body politic is a corporation—the king himself and the parliament—and yet neither the king nor the parliament could be sued, but only petitioned. ' I take it for granted,' he said, ' that when any part of an antient law is to be applied to a new case, the circumstances of the new case must agree in all essential points with the circumstances of the old cases to which that antient law was formerly appropriated.' The differences between the corporations, to which the principles and usages of law apply, and the States, to which those principles and usages did not apply, are thus enumerated by the learned justice :

Differences between States and corporations.

The differences between such corporations, and the several States in the *Union*, as relative to the general Government, are very obvious, in the following particulars. 1*st*. A corporation is a mere creature of the King, or of Parliament ; very rarely, of the latter ; most usually of the former only. It owes its existence, its name, and its laws (except such laws as are necessarily incident to all corporations merely as such), to the authority which create it. A State does not owe its origin to the Government of the *United States*, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself : *The voluntary and deliberate choice of the people.* 2*d*. A corporation can do no act but what is subject to the revision either of a Court of Justice, or of some other authority within the Government. A State is altogether exempt from the jurisdiction of the Courts of the *United States*, or from any other exterior authority, unless in the special instances where the general Government has power derived from the Constitution itself. 3*d*. A corporation is altogether dependent on that Government to which it owes its existence. Its charter may be forfeited by abuse. Its authority may be annihilated, without abuse, by an act of the Legislative body. A State, though subject in certain specified particulars, to the authority of the Government of the *United States*, is in every other respect totally independent upon it. The people of the State created, the people of the State can only change, its Constitution. Upon this power, there is no other limitation but that imposed by the Constitution of the *United States* ; *that it must be of the republican form.*[2]

Having thus stated the broad distinctions between the corporation created by

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 446).
[2] *Ibid.* (2 Dallas, 419, 448).

the king or act of parliament and the corporate body known as the State, created by the people thereof, he thus continues :

> These are so palpable, that I never can admit that a system of law, calculated for one of these cases is to be applied, *as a matter of course*, to the other, without admitting (as I conceive) that the distinct boundaries of law and Legislation may be confounded, in a manner that would make Courts arbitrary, and in effect *makers of a new law*, instead of being (as certainly they alone ought to be) *expositors of an existing one*.[1]

Mr. Justice Iredell's conclusions.

Thereupon, Mr. Justice Iredell concludes what may properly be called his judgement in the case submitted, in the following language :

> I have now, I think, established the following particulars.—1*st*. That the Constitution, so far as it respects the judicial authority, can only be carried into effect, by acts of the Legislature, appointing Courts, and prescribing their methods of proceeding. 2*d*. That *Congress* has provided no new law in regard to this case, but expressly referred us to the old. 3*d*. That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by analogy. The consequence of which in my opinion clearly is, that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.[2]

The Eleventh Amendment.

In view of the 11th amendment, growing out of this case, that 'the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State', it is important to quote a further portion of the learned justice's opinion, inasmuch as the amendment but restates the views of this distinguished jurist, whose early death was a loss to the distinguished body of which he was an ornament, and to the country of his adoption, to which he had rendered distinguished services :

> So much, however, has been said on the Constitution, that it may not be improper to intimate, that my present opinion is strongly against any construction of it, which will admit, under any circumstances a compulsive suit against a State for the recovery of money. I think, every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which, I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. With regard to the policy of maintaining such suits, that is not for this Court to consider, unless the point in all other respects was very doubtful. Policy might then be argued from, with a view to preponderate the judgment. Upon the question before us, I have no doubt. I have therefore nothing to do with the policy. But I confess, if I was at liberty to speak on that subject, my opinion on the policy of the case would also differ from that of the Attorney General. It is, however, a delicate topic. I pray to God, that if the Attorney General's doctrine, as to the law, be established by the judgment of this Court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant.[3]

The opinion of Mr. Justice Blair, following that of his brother Iredell, is very brief and to the point. He rejected illustrations for or against which might be drawn

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419 448).
[2] *Ibid.* (2 Dallas, 419, 449).
[3] *Ibid.* (2 Dallas, 419, 450).

from confederacies and from the practice or procedure of foreign states, 'because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here.' The question was, in his opinion, one to be determined by the Constitution and by the statutes of the Congress. By these sources of judicial power and procedure the court should entertain jurisdiction. If, on the other hand, the Constitution did not provide for the suit the court would be without jurisdiction and it should be dismissed. 'The Constitution of the *United States*', he said, 'is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the *Union*; for no State could have become a member, but by an adoption of it by the people of that State.'[1] He therefore asks whether, by that instrument, the individual States are subject to the judicial authority of the United States. This he answers in the affirmative, as the judicial power is, as he says, 'expressly extended, among other things, to controversies between a State and citizens of another State'. He then asks the very pertinent question, whether the case before the court is one of that description, and he answers this question in the affirmative, 'unless', as he says, 'it may be a sufficient denial to say, that it is a controversy between a citizen of one State and another State'. By this he means that, while a State may sue a citizen of another State in the Supreme Court, that is, may appear before the court as a plaintiff, the language of the Constitution does not permit a citizen to appear in the Supreme Court and to summon the State before it as a defendant. This argument would be, in his opinion, entitled to weight if, by the Constitution, a State could not be made a defendant. If, however, it could be summoned before the court and made a defendant, there was no reason why it should not be made a defendant at the instance of a citizen of another State. Thus, he says:

Opinion of Mr. Justice Blair in favour of the plaintiff.

A State can admittedly be defendant in certain cases.

> Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude, that the jurisdiction of this Court reaches the case where a State is Plaintiff, but not where it is Defendant? In this latter case, should any man be asked, whether it was not a controversy between a State and citizen of another State, must not the answer be in the affirmative? A dispute between *A* and *B* is surely a dispute between *B* and *A*. Both cases, I have no doubt, were intended; and probably, the State was first named, in respect to the dignity of a State.[2]

The learned justice states, however, that the very dignity of the State has been alleged as a reason why it should only appear at the bar of a court as a plantiff. To this objection Mr. Justice Blair's reply was brief, immediate, and to the point. Thus:

> It is, however, a sufficient answer to say, that our Constitution most certainly contemplates, in another branch of the cases enumerated, the maintaining a jurisdiction against a State, as Defendant; this is unequivocally asserted when the judicial power of the *United States* is extended to controversies between two or more States; for there, a State must, of necessity, be a Defendant. It is extended also, to controversies between a State and foreign States; and if the argument taken from the order of designation were good, it would be meant here, that this Court might have cognizance of a suit, where a State is Plaintiff, and some foreign State a Defendant, but not where a foreign State brings a suit against a State.[3]

Disputes with Foreign States.

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 450).
[2] *Ibid.* (2 Dallas, 419, 450). [3] *Ibid.* (2 Dallas 419, 451).

This conception of the Constitution was not, however, to his liking, because it lost sight of the fact that the instances would be very rare indeed in which an American State could as a plaintiff sue a foreign State in the Supreme Court, and because it lost sight of the policy involved in the settlement of suits between States by judicial means instead of by the time-honoured resort to force. Thus he says :

> This, however, not to mention that the instances may rarely occur, when a State may have an opportunity of suing, in the *American* Courts, a foreign State, seems to lose sight of the policy which, no doubt, suggested this provision, viz. That no State in the *Union* should, by withholding justice, have it in its power to embroil the whole confederacy in disputes of another nature.[1]

Mr. Justice Blair next calls attention to the fact that the Supreme Court is vested with original jurisdiction in cases where a State is a party, and that the State is a party when it is defendant as well as when it is plaintiff ; and that to refuse jurisdiction when the State is defendant would be to renounce jurisdiction, when it seems to be conferred, at least when it was not withdrawn, by the Constitution. Thus :

Meaning of the word 'party'.

> The Constitution . . . gives to the Supreme Court original jurisdiction, among other instances, in the case where a State shall be a *party* ; but is not a State a party as well in the condition of a Defendant as in that of a Plaintiff ? And is the whole force of that expression satisfied by confining its meaning to the case of a Plaintiff-State ? It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the Constitution ; because it would be a refusal to take cognizance of a case, where *a State is a party*.[2]

Question of execution is not relevant.

Mr. Justice Blair was not much impressed by the argument that the court should not take jurisdiction because the Congress had not provided a form of execution. ' Let us go on ', he said, ' so far as we can ; and if, at the end of the business, notwithstanding the powers given us in the 14th section of the judicial law, we meet difficulties insurmountable to us, we must leave it to those departments of Government which have higher powers ; to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation, that a State may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the *United States*, though not conformable to their own ideas of justice ? '[3]

As in the case of Attorney General Randolph so in the case of Mr. Justice Blair, the decent respect to the opinions of mankind conveyed a hope and a warning. But the Justice, however, did not allow this phase of the question to rest here. He shrewdly observed that the decision might be against the plaintiff and in favour of the defendant State, in which case, if the plaintiff should be minded to bring a suit of the same kind again, the State would be entitled to, and apparently would, in his opinion, interpose the judgement had in the previous suit. Thus :

> Besides, this argument takes it for granted, that the judgment of the Court will be against the State ; it possibly may be in favor of the State ; and the difficulty vanishes. Should judgment be given against the Plaintiff, could it be said to be void, because extra-judicial ? If the Plaintiff, grounding himself upon that notion, should renew his suit against the State, in any mode in which she may permit herself

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 451).
[2] *Ibid.* (2 Dallas, 419, 451).
[3] *Ibid.* (2 Dallas, 419, 451–2).

to be sued in her own Courts, would the Attorney General for the State be obliged to go again into the merits of the case, because the matter, when here, was *coram non judice*? Might he not rely upon the judgment given by this Court, in bar of the new suit? To me it seems clear that he might.[1]

Petition of Right not applicable to the case.

To Mr. Justice Blair the right to suit existed. He believed that the right to petition would be inapplicable in the present case because the sovereign could not be sued in a court other than his own, especially when that court had been created by the States for the express purpose of suing and being sued therein. Thus, he says:

And if a State may be brought before this Court, as a Defendant, I see no reason for confining the Plaintiff to proceed by way of petition; indeed, there would even seem to be an impropriety in proceeding in that mode. When sovereigns are sued in their own Courts, such a method may have been established, as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit, in any other than the sovereign's own Courts, it follows, that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty.[2]

Mr. Justice Blair, therefore, was of the opinion that, both by the Constitution and the act of Congress, a State might be sued by a citizen of another State; but he felt that, if the judgement of the court should be in favour of the plaintiff's right to sue, 'a judgment by default, in the present state of the business, and writ of enquiry for damages, would be too precipitate in any case, and too incompatible with the dignity of a State in this. Further opportunity of appearing to defend the suit ought to be given.'[3]

Opinion of Mr. Justice Wilson in favour of the plaintiff.

Mr. Justice Wilson had been a member of the Continental Congress and had signed, on behalf of Pennsylvania, the Declaration of Independence. He had been a very influential member of the conference of the states at Philadelphia and, on behalf of Pennsylvania, his name is appended to the Constitution. If Mr. Justice Iredell, an ardent federalist, was inclined to elevate the State and to regard the individual as inferior to it, Mr. Justice Wilson, on the other hand, also a federalist, was not unwilling to deprive the State of its pre-eminence and to elevate the citizen, so that, in his opinion, the suit of an individual of another State would be in reality not a suit against the State but against a certain number of persons living within its geographical lines.

These observations have been premised not by way of criticism of a great and worthy man, whose merits are hardly yet recognized as they deserve to be, but in order that the reader may understand that his opinion is more in the nature of an argument than a judgement, in that he sought, from no unworthy motive, to incorporate in the judgement of the court the views which he had expressed, and in vain, in the Convention.

After a brief introduction, stating the nature and importance of the case, Mr. Justice Wilson stated that he would examine it '1*st*. By the principles of general jurisprudence. 2*d*. By the laws and practice of particular States and *Kingdoms* . . . 3*dly*. And chiefly, . . . by the Constitution of the United *States*, and the legitimate result of that valuable instrument.'[4]

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 452).
[2] *Ibid.* (2 Dallas, 419, 452).
[3] *Ibid.* (2 Dallas, 419, 452–3).
[4] *Ibid.* (2 Dallas, 419, 453).

The State is merely the agent of its own people.

In the opening words of his opinion, Mr. Justice Wilson prepares the reader for a denial of sovereignty of the States forming the more perfect union, of which he was assuredly one of the framers. One of the parties to the case, he says, 'is a State, certainly respectable, claiming to be *sovereign*.' He thereupon proceeds to examine the claim of the State, which he admits to be respectable, to be sovereign. Mr. Justice Wilson begins this part of his argument by stating that man 'is the workmanship of his all-perfect Creator: a *State*, useful and valuable as a contrivance is, is the *inferior* contrivance of *man*; and from his *native* dignity derives all its *acquired* importance.' By this statement the learned Justice means no disrespect to the State. His purpose is to convey the idea that the State is made by the people for their benefit and that, made by them, it is subject to them. It is their agent for the purposes of society. It should not be their master—although it is commonly so considered—and the government of the State, if not confused with it, is merely an agency of the people making and composing the State. The ministers, however high their place or position, are but the personal agents or servants of the people making and composing the State. This was sound doctrine when it was uttered. It is sound doctrine to-day. Unfortunately, now as then, it seems revolutionary to many people brought up in other parts of the world and in an atmosphere of hereditary succession.

Mr. Justice Wilson's views on this point, which he regards as very important—and they are certainly material to his judgement—are thus expressed:

> Let a *State* be considered as subordinate to the People: But let everything else be subordinate to the *State*. The *latter* part of this position is equally necessary with the former. For in the practice, and even at length, in the science of politics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the *end* to the *means*. As the *State* has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the *second* degree, many of the volumes of confusion concerning sovereignty owe their existence. The *ministers*, dignified very properly by the appellation of the *magistrates*, have wished, and have succeeded in their wish, to be considered as the *sovereigns* of the State.[1]

Having thus put matters, as he conceives them, in their true light, Mr. Justice Wilson thus defines a State, in terms which either are now or must one day be accepted of man:

Definition of a State.

> By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an *artificial* person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property, distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are men.[2]

After this definition and analysis Mr. Justice Wilson proceeds by the familiar method of question and answer. Thus:

> Is the foregoing description of a State, a true description? It will not be questioned, but it is. Is there any part of this description, which intimates, in the

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 455). [2] *Ibid.* (2 Dallas, 419, 455–6).

remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended, that there is. If justice is not done; if engagements are not fulfilled; is it, upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper, it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, *that he binds himself*. Upon the same principles, upon which he becomes bound *by the laws*, he becomes amenable to the Courts of Justice, which are formed and authorized by those laws. If one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of *each*, singly, is undiminished; the dignity of all jointly, must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice; Upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a* SOVEREIGN *State*? Surely not.[1]

Obligation of a State to do justice.

This brings him to consider the nature of sovereignty, in connexion with which he remarks that the admission of a sovereign involves at the same time the existence of a subject, that the word 'subject' is unknown to the Constitution except in relation to foreigners, that the relation of sovereign and subject, therefore, does not exist in the United States and that the state of Georgia, for example, composed of citizens, cannot be a sovereign because it has no subjects. Mr. Justice Wilson next proceeds to consider a second sense in which the term 'sovereign state' is used. Thus:

Georgia is not a 'sovereign' State.

In another case, according to some writers, every State, which governs itself, without any dependence on another power, is a sovereign State.[2]

Mr. Justice Wilson vouches for the statement the authority of Vattel.

From what has already been said, it would be expected that the learned Justice denies to Georgia the character of a sovereign State, because the people thereof were sovereign, not the State; and believing, as he did, that the people of the United States formed a nation, not a union of States, it would be surprising if, in his opinion, the people of a section should be regarded as equal to the people of other sections. 'As a Judge of this Court', he said, 'I know, and can decide, upon the knowledge, that the citizens of *Georgia*, when they acted upon the large scale of the *Union*, as a part of the "People of the *United States*", did *not* surrender the Supreme or Sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is* NOT a *sovereign State*. If the judicial decision of this case forms *one* of *those* purposes; the *allegation* that *Georgia* is a sovereign State, is unsupported by the *fact*.'[3]

There is, however, according to Mr. Justice Wilson, a third sense in which the term 'sovereign' is used, and it seemed to be material to his argument to define this sense and to give the reason for it, in order to show that Georgia could not be a sovereign State, and therefore was not immune from suit at the instance of an individual, even although a State, properly sovereign, might be. Thus:

There is a third sense, in which the term sovereign is frequently used, and which it is very material to trace and explain, as it furnishes a basis for what, I

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 456).
[2] *Ibid.* (2 Dallas, 419, 457).
[3] *Ibid.* (2 Dallas, 419, 457).

presume to be one of the principal objections against the jurisdiction of this Court over the State of *Georgia*. In this sense, sovereignty is derived from a feudal source; and like many other parts of that system, so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the *American* States.[1]

The feudal theory of jurisdiction.

The learned Justice here enters upon a sketch of feudalism, by virtue of which the land belonged to the lord, the kingdom was a fief, and the peoples were subject to the land-owner, just as the land-owners themselves were subject to their feudal superior, who in turn was subject to the king. 'But, in the case of the *King*,' he says, 'the sovereignty had a double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and consequently, on feudal principles, no right of jurisdiction'.[2] He quotes Blackstone as saying that 'The law ascribes to the King, the attribute of sovereignty: he is sovereign and independent, within his own dominions; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no *suit* or action can be brought against the *King*, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power'.[3] The principle to be derived from this, Mr. Justice Wilson says, is that 'all human law must be prescribed by a *superior*'. This principle he rejects, and

The republican theory.

insists that 'another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those whose obedience they require. The *sovereign*, when traced to his source, must be found in the *man*'.[4]

Mr. Justice Wilson now passes to a consideration of the second phase of the subject, namely, the laws and practice of different states and kingdoms; and, imbued with the classics, he refers to an example no doubt pleasing to his contemporaries, who apparently had more leisure than their successors for the amenities of life. Thus, he says:

> In ancient Greece, as we learn from *Isocrates*, whole nations defended their rights before crowded tribunals. Such occasions as these excited, we are told, all the powers of persuasion. . .[5]

He justifies a resort to the laws and practices of particular States on the ground that they will furnish 'what is called an argument *a fortiori*; because all the instances produced will be instances of *subjects* instituting and supporting suits against those, who were deemed *their own sovereigns*'. 'These instances are stronger', he says, 'than the present one, because between the present plaintiff and defendant, no such unequal relation is alleged to exist.'[6]

The first instance to which he refers seems peculiarly appropriate to an American, as we would like to think that not only freedom and democracy but justice found in the western world congenial soil to bring forth their perfected fruits. This instance is for obvious reasons stated in Mr. Justice Wilson's own words:

> *Columbus* achieved the discovery of that country, which, perhaps, ought to bear his name. A contract made by *Columbus* furnished the first precedent for

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 457).
[2] *Ibid.* (2 Dallas, 419, 458).
[3] *Ibid.* (2 Dallas, 419, 458).
[4] *Ibid.* (2 Dallas, 419, 459).
[5] *Ibid.* (2 Dallas, 419, 459).
[6] *Ibid.* (2 Dallas, 419, 459).

supporting, in his discovered country, the cause of injured merit against the claims and pretensions of haughty and ungrateful power. His son *Don Diego* wasted two years in incessant, but fruitless, solicitation at the Court of *Spain*, for the rights which descended to him, in consequence of his father's original capitulation. He endeavoured, at length, to obtain, by a legal sentence, what he could not procure from the favour of an interested *Monarch*. He commenced a *suit against Ferdinand*, before the Council which managed *Indian* affairs ; and that *Court*, with integrity which reflects honor on its proceedings, *decided* against the *King*, and *sustained Don Diego's* claim.[1]

The case of Don Diego and the King of Spain.

Coming to the question of England—for it is the principles and usages of that country which, with or without statute, control—and without going into details he states in general terms the results of his examination of English precedents :

In *England*, according to Sir *William Blackstone*, no suit can be brought against the *King*, even in civil matters. So, in that *Kingdom*, is the law, at *this* time received.[2]

Mr. Justice Wilson contended, however, that it was not always so ; but, after citing earlier practice, he is obliged to state :

True it is, that now in *England*, the *King* must be sued in his Courts, by *Petition*.[3]

So far, he agrees with Mr. Justice Iredell. He differs, however, in regard to a petition as a matter of form, and asserts that in fact the result is the same as if action were brought instead of a petition filed against the king. ' But even now ', he says, ' the difference is only in the *form*, not in the *thing*. The judgments or decrees of those Courts will substantially be the same upon a *precatory* as upon a *mandatory* process '.[4] English practice, even as stated by Mr. Justice Wilson, does not, at least directly, sustain his contention, and he turns with greater pleasure, if not profit, to an incident peculiarly pleasant to recall at this day and under present conditions, quoting the language of and commenting upon an incident which has not yet lost its hold upon the imagination :

' Judges ought to know, that the poorest peasant is a man, as well as the *King* himself : all men ought to obtain justice, since, in the estimation of justice, all men are *equal*, whether the Prince complain of a peasant, or a peasant complain of the Prince.' These are the words of a *King*, of the late *Frederic of Prussia*. In his Courts of Justice, that great man stood upon his native greatness, and disdained to mount upon the artificial stilts of sovereignty.[5]

With these noble words and with this eulogium upon the monarch, Mr. Justice Wilson closes the second phase of his argument, and comes to what was in fact the real question, and to which the first two disquisitions on sovereignty were in reality an elaborate introduction.

' I am ', he says, ' thirdly, and chiefly, to examine the important question now before us, by the Constitution of the *United States*, and the legitimate result of that valuable instrument. Under this view, the question is naturally sub-divided into two others. 1. *Could* the Constitution of the *United States* vest a jurisdiction over the State of *Georgia* ? 2. *Has* that Constitution vested such jurisdiction in this Court ?

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 459).
[2] *Ibid.* (2 Dallas, 419, 460).
[3] *Ibid.* (2 Dallas, 419, 460).
[4] *Ibid.* (2 Dallas, 419, 460).
[5] *Ibid.* (2 Dallas, 419, 460–1).

I have already remarked, that in the *practice*, and even in the *science* of politics, there has been frequently a strong current against the natural order of things ; and an *inconsiderate* or an *interested* disposition to sacrifice the *end* to the *means*. This remark deserves a more particular illustration. Even in almost every nation which has been denominated *free*, the *State* has assumed a supercilious pre-eminence above the *people*, who have *formed* it : Hence, the haughty notions of *state independence*, *state sovereignty*, and *state supremacy*. In *despotic* Governments, the Government has usurped, in a similar manner, both upon the *state* and the *people* : Hence, all arbitrary doctrines and pretensions concerning the Supreme, absolute, and uncontrollable, power of *Government*. In *each*, *man* is degraded from the *prime* rank, which he ought to hold in human affairs : In the *latter*, the *state* as well as the man is degraded '.[1] After citing degradations occurring 'in *history*, in *politics*, and in common life ', in which Louis XIV is flayed and the England of his day not spared, he thus speaks of his adopted country—for he was a Scotchman by birth :

Excessive claims of States against their peoples.

> In the *United States*, and in the several States which compose the *Union*, we go not so far : but still, we go *one step* farther than we ought to go, in this unnatural and inverted order of things. The *States*, rather than the PEOPLE, for whose sakes the States exist, are frequently the objects which attract and arrest our principal attention.[2]

Omitting the passage from his opinion in which he insists that, even in the language of daily life, we speak of the United States instead of the people of the United States, he says :

The Constitution is derived from 'The People'.

> Our national scene opens with the most magnificent object, which the nation could present : ' The PEOPLE of the *United States* ' are the first personages introduced. Who were those people ? They were the citizens of thirteen States, each of which had a separate Constitution and Government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its *Legislative* authority : *Executive* or *Judicial* authority it had none. In order, therefore, to form a more perfect union, to *establish justice*, to insure domestic tranquillity, to provide for common defence, and to secure the blessings of liberty, *those people*, among whom were the people of *Georgia*, ordained and established the present Constitution. By that Constitution, Legislative power is vested, Executive power is vested, *Judicial* power is vested.[3]

The learned Justice, thoroughly at home in this phase of the subject, proceeds to ask, if the people of the States could bind the States, including the State of Georgia, and the answer to this question, given in his own language, could hardly be doubtful. Thus he says :

The People of the United States can bind the State of Georgia.

> The question now opens fairly to our view, *could* the *people* of those States, among whom were those of *Georgia*, bind those *States*, and *Georgia*, among the others, by the Legislative, Executive, and Judicial power so vested ? If the principles on which I have founded myself, are just and true ; this question must unavoidably receive an affirmative answer. If those *States* were the *work* of those *people* ; those people, and, that I may apply the case closely, the people of *Georgia*, in particular, could alter, as they pleased, their former work : To any given degree, they could *diminish* as well as enlarge it. *Any* or *all* of the former State-powers,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 461).
[2] *Ibid.* (2 Dallas, 419, 462).
[3] *Ibid.* (2 Dallas, 419, 463).

they could *extinguish* or *transfer*. The inference, which necessarily results, is, that the Constitution ordained and established by *those* people; and, still closely to apply the case, in particular by the people of *Georgia*, *could* vest jurisdiction or judicial power over those States, and over the state of *Georgia* in particular.[1]

The learned Justice, proceeding logically, and speaking as a judge rather than as a statesman, puts and answers the pertinent question, whether the Constitution has done so. Thus:

The next question under this head, is, Has the Constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the *United States* intended to bind those States by the *Judicial* power vested by the national Constitution, a previous enquiry will naturally be: Did those *people* intend to bind those *States* by the *Legislative* power vested by that Constitution? The articles of confederation, it is well known, did not operate upon individual *citizens*; but operated only upon *States*. This defect was remedied by the national Constitution, which, *as all allow*, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced on the other: For they seem to think, that the present Constitution operates only on individual citizens, and not on States. This opinion, however, appears to be altogether unfounded. When certain laws of the States are declared to be 'subject to the revision and controul of the *Congress*;' it cannot, surely, be contended, that the *Legislative* power of the national Government was meant to have *no* operation on the several States. The *fact*, uncontrovertibly established in *one* instance, proves the *principle* in *all other* instances, to which the facts will be found to apply. We may then infer, that the people of the *United States* intended to bind the several States, by the Legislative power of the national government.[2]

Pursuing further the same subject, and by his favourite method of question and answer, Mr. Justice Wilson continues:

Legislative acts are enforced by the Executive and interpreted by the Courts.

In order to make the discovery, at which we ultimately aim, a *second* previous enquiry will naturally be—Did the people of the *United States* intend to bind the several States, by the Executive power of the national Government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. Ever since the time of *Bracton*, his maxim, I believe, has been deemed a good one—'*Supervacuum esset, leges condere, nisi esset qui leges tueretur.*' 'It would be superfluous to make laws, unless those laws, when made, were to be enforced.' When the laws are plain, and the application of them is uncontroverted, they are enforced immediately by the *Executive* authority of Government. When the application of them is doubtful or intricate, the interposition of the *judicial* authority becomes necessary. The same principle, therefore, which directed us from the *first* to the *second* step, will direct us from the *second* to the *third* and *last* step of our deduction. Fair and conclusive deduction, then, evinces that the *people* of the *United States* did vest this Court with jurisdiction over the State of *Georgia*. The same truth may be deduced from the *declared objects*, and the general texture of the Constitution of the *United States*. One of its declared objects is, to form an union more perfect, than, before that time, had been formed. Before that time, the *Union* possessed Legislative, but *unenforced* Legislative power over the States. Nothing could be more natural than to *intend* that this Legislative power should be enforced by powers Executive and Judicial.[3]

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 463–4).
[2] *Ibid.* (2 Dallas, 419, 464).
[3] *Ibid.* (2 Dallas, 419, 464–5).

The judiciary as a means of keeping international peace.

On what may be called the judicial phase of the question, and what is in the Constitution the judicial branch of the United States, Mr. Justice Wilson is on very firm ground, and his language is here not merely the language of the jurist and the statesman but of the publicist who sees in judicial organization the hope and the guarantee of peace between the nations. It should be mentioned, in this connexion, that Mr. Justice Wilson, in the very opening words of his opinion, spoke of the law of nations, and showed his familiarity with projects of international organization. And he seems to have believed that the Supreme Court, for whose creation he spoke in the Convention and of which he was, when created, a valued member, would be the means of holding the nations together and of preserving peace between them by the judicial as well as judicious administration of justice. Thus: By that law [meaning the law of Nations],

> The several States and Governments spread over our globe, are considered as forming a *society*, not a NATION. It has only been by a very few comprehensive minds, such as those of *Elizabeth* and the *Fourth Henry*, that this last great idea has been even contemplated.[1]

To revert now to the matter immediately in hand, he says:

> Another declared object [of the Constitution] is, 'to establish justice'. This points, in a particular manner, to the *Judicial* authority. And when we view this object in conjunction with the declaration, 'that no State shall pass a law impairing the obligation of contracts;' we shall probably think, that this object points, in a particular manner, to the jurisdiction of the Court over the several States. What good purpose could this Constitutional provision *secure*, if a State might pass a law, impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, to no controuling Judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages.. A third declared object is—'to insure domestic tranquillity'. This tranquillity is most likely to be disturbed by controversies between States. These consequences will be most peaceably and effectually decided, by the establishment and by the exercise of a superintending judicial authority. By such exercise and establishment, the law of nations; the rule between contending States; will be enforced among the several States, in the same manner as municipal law.[2]

After these observations, Mr. Justice Wilson believed himself justified in using language which we may well consider peculiarly distasteful to those who look upon the Constitution as creating a union of States instead of a nation composed of people physically residing within the boundaries of States; language which no doubt led to, if it did not actually inspire, the amendment to the Constitution withdrawing from the individuals the right to sue States and from the Supreme Court the power to entertain jurisdiction in such cases. Thus:

The people of the United States formed themselves into a single nation.

> Whoever considers, in a combined and comprehensive view, the *general texture* of the Constitution, will be satisfied, that the people of the *United States* intended to form themselves into a nation, for *national purposes*. They instituted, for *such* purposes, a national Government, complete in all its parts, with powers Legislative, Executive, and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to *such* purposes, any man

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 453). The great idea to which Justice Wilson refers is the so-called 'great design' popularly attributed to Henry IV of France, but really the composition of the Duc de Sully.

[2] *Ibid.* (2 Dallas, 419, 465).

or body of men, any person, natural or artificial, should be permitted to claim successfully, an entire exemption from the jurisdiction of the national Government ? Would not such claims, crowned with success, be repugnant to our very existence as a nation ? When so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point, we may safely conclude, as the *legitimate result* of this Constitution, that the State of *Georgia* is amenable to the jurisdiction of this court.[1]

Mr. Justice Wilson had said, in the concluding sentence of the first paragraph of his opinion that 'This question, important in itself, will depend on others more important still'; and upon the threshold of his opinion, which, as frequently said, is in the nature of an argument, he boldly said :

and may, perhaps, be ultimately resolved into one, no less *radical* than this—'do the people of the *United States* form a Nation ?'

We might stop here, because, if the United States formed a nation or a nation for national purposes the suit would be sustained if it could be brought within one of these national purposes. But Mr. Justice Wilson was unwilling to rest the case upon general considerations, for hitherto his argument has been general and in large degree untechnical, just as Mr. Justice Iredell's opinion was special and technical. Therefore, within the compass of a single paragraph, he states the technical reason which, in his opinion, makes the conclusion inevitable that a State of the United States must be a defendant in suits between the States, and could be a defendant in a controversy between it and an individual. Thus :

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution : It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself. 'The judicial power of the *United States* shall extend to controversies between *two States.*' *Two* States are supposed to have a controversy between them : This controversy is supposed to be brought before those vested with the judicial power of the *United States* : Can the most consummate degree of professional ingenuity devise a mode by which this 'controversy between two States' can be brought before a Court of law ; and yet neither of those States be a Defendant ? 'The judicial power of the United States shall extend to controversies between a *State* and citizens of *another* State.' Could the strictest legal language ; could even that language, which is peculiarly appropriated to an art deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law ; could this strict and appropriated language describe, with more precise accuracy, the cause now depending before the tribunal ? *Causes*, and not *parties* to causes, are weighed by justice in her equal scales : On the former *solely*, her attention is fixed : To the latter, she *is*, as she is painted, blind.[2]

Opinion of Mr. Justice Cushing in favour of the plaintiff.

As in the case of Mr. Justice Blair, so in the case of Mr. Justice Cushing, foreign precedent, even although English, was discarded as having nothing to do with the matter in issue ; and, like Justice Blair's opinion, Justice Cushing's was short. The question, as stated by Mr. Justice Cushing, is very simple :

The grand and principal question in this case is, whether a State can, by the Foederal Constitution, be sued by an individual citizen of another State ?[3]

Without introduction to show the importance of the case, or without an appeal to

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 465–6).
[2] *Ibid.* (2 Dallas, 419, 466).
[3] *Ibid.* (2 Dallas, 419, 466).

precedent, in order to give it historical setting, he plunges, as it were, at the very beginning, *in medias res*, saying :

> The point turns not upon the law of practice of *England*, although perhaps, it may be in some measure elucidated thereby, nor upon the law of any other country whatever ; but upon the Constitution established by the people of the *United States* ; and particularly, upon the extent of powers given to the Foederal Judiciary in the 2d section of the 3d article of the Constitution.[1]

After quoting the 2nd section of the 3rd article, the learned Justice thus comments upon the text of the section :

> The judicial power, then, is expressly extended to '*controversies between a State and citizens of another State*'. ' When a citizen makes a demand against a State of which he is not a citizen, it is as really a controversy between a State and a citizen of another State as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a Defendant, because it would affect the sovereignty of States. If that be the Case, what shall we do with the immediate preceding clause ; '*controversies between two or more States*,' where a State must of necessity be Defendant ? If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea ? Why was not an exception made, if one was intended ? [2]

Disputes with Foreign States.

Pursuing this subject further, the learned Justice broadens his argument to include not merely States of the Union but foreign States or Nations, and in so doing he is led to consider what he is pleased to call the design of the framers of the Constitution in creating the Supreme Court in order that disputes, not only between citizens and States, between the States themselves, but also with foreign States, might be settled peaceably in accordance with principles of justice, or, to use a phrase with which we of this country are fortunately familiar, by due process of law. Thus :

> Again, what are we to do with the last clause of the section of judicial powers, viz. '*controversies between a State, or the citizens thereof, and foreign states or citizens*'. Here again, States must be suable or liable to be made defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the *United States* and a foreign State, as the clause expresses, one of them must be Defendant. And then, what becomes of the sovereignty of States so far as suing affects it ? But although the words appear reciprocally to affect the State here and a foreign State, and put them on the same footing so far as may be, yet ingenuity may say that the State here may sue, but cannot be sued ; but that the foreign State may be sued, but cannot sue. We may touch foreign sovereignties, but not our own. But I conceive, the reason of the thing, as well as the words of the Constitution, tend to shew that the Foederal Judicial power extends to a suit brought by a foreign State against any one of the *United States*.[3]

Foreign State files, but withdraws, suit against State of American Union.

The correctness of the view expressed in the last phrase of the learned Justice's opinion awaits confirmation, for although a suit by a foreign State against one of the United States has been filed, it has not been prosecuted to judgement. On November 6, 1916, the Republic of Cuba, by its counsel, asked leave of the Supreme Court to file its bill against the State of North Carolina. The request, however, was withdrawn on January 8, 1917.[4] It is, however, interesting to observe in this

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 466). [2] *Ibid.* (2 Dallas, 419, 467).
[3] *Ibid.* (2 Dallas, 419, 467). [4] *Republic of Cuba* v. *State of North Carolina* (242 U.S. 665).

connection that this portion of Mr. Justice Cushing's opinion admitting jurisdiction in such a case was confirmed by Mr. Justice Curtis, while at the bar, both before and after he was himself a Justice of the Supreme Court.[1]

Position of the Supreme Court in the society of Nations.

Next as to the design ; for Mr. Justice Cushing, although he is not to be classed as a votary of international law, seems to have had a correct view of the economy of the Supreme Court in a society of nations, and especially its function in the relations of the States with themselves and of the United States with foreign Nations. Thus, he says :

One design of the general Government was, for managing the great affairs of peace and war and the general defence, which were impossible to be conducted, with safety, by the States separately. Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. Thus, States at home and their citizens, and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as to controversies between them. So also, with respect to controversies between a State and citizens of another State (at home) comparing all the clauses together, the remedy is reciprocal ; the claim to justice equal. As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further, if a State is entitled to Justice in the Foederal Court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both ? The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed, the latter are founded upon the former ; and the great end and object of them must be to secure and support the rights of individuals, or else, vain is government.[2]

States are corporations.

Mr. Justice Cushing next takes up the objection that the maintenance of a suit would 'reduce States to mere corporations, and take away all sovereignty'. This he meets by admitting that the States are corporations ; that, in so far as the States have vested the United States with certain powers, they have divested themselves of those powers and their exercise, and have to this extent limited their sovereignty ; that, if the limitation be found too great or inconvenient, the Constitution can be amended—and the learned Justice was right in adverting to this, because ten amendments had been made to it before the decision of this case and one shortly thereafter in consequence of its decision—and that, until amended, all officers of the United States were bound by their oaths to take it, interpret it, and administer it as it was. Thus, he says :

As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers ? As to individual States and the *United States*, the Constitution marks the boundary of powers. Whatever power is deposited with the *Union* by the people for their own necessary security, is so far a curtailing of the power and prerogatives of States.[3]

The learned Justice thereupon enumerates some of the powers with which the States vested their agent, the United States, and some of the restrictions which the States

[1] For the views of Mr. Curtis, see *post*, pp. 110–12.
[2] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 467–8).
[3] *Ibid.* (2 Dallas, 419, 468).

themselves placed upon the exercise of powers which they possessed, but whose exercise they renounced. After which, he thus continues :

So that . . . no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. If the Constitution is found inconvenient in practice, in this or any other particular, it is well that a regular mode is pointed out for amendment. But, while it remains, all officers, Legislative, Executive and Judicial, both of the States and of the *Union*, are bound by oath to support it.[1]

Can the United States be sued by its citizens ?

Mr. Justice Cushing might have stopped here, inasmuch as he has already stated his view that the action might be maintained, and the reasons which justified its maintenance. But in a subsequent portion of his opinion he touches upon a question of great interest to his contemporaries and to his fellow-citizens of to-day ; whether the United States as a corporation—for if a State is a corporation the United States clearly is one—may be sued by one of its citizens ; and he describes in the language of a master the functions of the Supreme Court as an umpire, unaffected by the decision, holding the scales of justice with even hand wherewith to weigh the controversies that would inevitably arise between the States, as in times past they had arisen. On the first of these points he says :

One other objection has been suggested, that if a State may be sued by a citizen of another State, then the *United States* may be sued by a citizen of any of the States, or, in other words, by any of their citizens. If this be a necessary consequence, it must be so. I doubt the consequence, from the different wording of the different clauses, connected with other reasons. When speaking of the *United States*, the Constitution says, '*controversies to which the* UNITED STATES *shall be a party*,' not controversies between the *United States* and any of their citizens. When speaking of States, it says, '*controversies between two or more States ; between a State and citizens of another State.*' As to reasons for citizens suing a different State, which do not hold equally good for suing the *United States* : one may be, that as controversies between a State and citizens of another State, might have a tendency to involve both States in contest, and perhaps in war, a common umpire to decide such controversies, may have a tendency to prevent the mischief.[2]

On the second point he says, and with this leave must be taken of Mr. Justice Cushing for the present :

That an object of this kind was had in view, by the framers of the Constitution, I have no doubt, when I consider the clashing interfering laws which were made in the neighbouring States, before the adoption of the Constitution, and some affecting the property of citizens of another State, in a very different manner from that of their own citizens.[3]

Opinion of Chief Justice Jay in favour of the plaintiff.

We now come to the opinion of Chief Justice Jay ; and it is difficult, in mentioning his name, to resist a digression, in order to state, however briefly, the services of this illustrious man—statesman, publicist, jurist—who rendered inestimable services to his country, which were never requited in his lifetime, but who, by his services to arbitration and the peaceful settlement of international disputes, may justly be considered as a benefactor of mankind. However, this is not the occasion to dwell upon these things, other than to say that he was a leader of public opinion

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 468).
[2] *Ibid.* (2 Dallas, 419, 469).
[3] *Ibid.* (2 Dallas, 419, 469).

in the State of New York, president of the Congress under the Confederation, and negotiator and signer of the treaty with Great Britain recognizing the independence of the United States; secretary of state for foreign affairs thereafter until the Constitution, which he defended with Hamilton and Madison in the Federalist, went into effect; acting secretary of state until the return of Mr. Jefferson from France to assume that post; Chief Justice of the United States from its creation until his resignation in 1794; negotiator of the treaty, which bears and perpetuates his name with Great Britain, by virtue of which war was prevented between the two countries and arbitration again introduced into the practice of nations. It is no wonder that he possessed the confidence of Washington; it is no wonder that Washington laid at his disposal practically every post under the new government; it is no wonder that he became Chief Justice of the United States.

But to the opinion of this first Chief Justice of the Supreme Court of the United States. Mr. Chief Justice Jay, in the opening words of his opinion, says that:

The question we are now to decide has been accurately stated, viz. Is a State suable by individual citizens of another State? [1]

In order to determine this question, the Chief Justice proposed, in the very next sentence, to pursue a threefold inquiry:

Analysis of his argument.

It is said, that *Georgia* refuses to appear and answer to the Plaintiff in this action, because she is a *sovereign* State, and therefore not *liable* to such actions. In order to ascertain the merits of this objection, let us enquire, 1st. In what sense, Georgia is a sovereign State. 2d. Whether suability is compatible with such sovereignty. 3d. Whether the constitution (to which *Georgia* is a party) authorizes such an action against her.[2]

The Chief Justice then takes up, and in the order stated, each object of the threefold inquiry, and it is necessary to present his views with considerable fullness, because, if his premises are admitted, the conclusion he draws from them is inevitable, that Georgia was not a sovereign State in the sense of the law of nations; that it, therefore, could be sued, even although a sovereign State could not be; and that, in any event, the wording of the Constitution expressly authorized such a suit.

It may be said at the outset, and without involving the slightest criticism of the Chief Justice or of his motives—for, as Webster has truly and impressively said, when the judicial ermine touched Jay it touched something as pure as itself—that he approached the question from the standpoint of the revolutionary statesman, impressed with the union of the colonies, the necessity for their union to obtain their independence from Great Britain and to maintain it when thus obtained against the world. But it may also be added that he had interpreted the Constitution as Secretary of State of the Confederation, seeing the need of a court to preserve uniformity in the interpretation of the laws and in the administration of justice; that as a publicist, interested in the maintenance of peace at home and abroad—he began the study of law by mastering the immortal text of Grotius, and, on graduation from King's College, now Columbia University, he delivered his first public address on the blessings of peace—he instinctively felt that disputes between the States of the American Union could be, and that the disputes of the Nations forming the society of nations should be, decided, in so far as they were justiciable, by a court

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 469).

[2] *Ibid.* (2 Dallas, 419, 469).

of the United States, on the one hand, and of the society of nations, on the other. An amendment to the Constitution might deprive the Supreme Court of the jurisdiction which Mr. Chief Justice Jay believed it possessed, but no amendment could deprive the views he held and expressed on these subjects of their reasonableness, of their wisdom, and of their beneficent effect upon the Nations if one day they may open their minds and their hearts to the appeal to reason.

Is Georgia a 'sovereign' State ?

First. In what sense is Georgia a sovereign state ? The reasoning of the Chief Justice upon this point is historical, and is only to be considered as legal in so far as the historical narrative in which he indulges fixes the status of Georgia as one of the colonies, whose peoples were subject to the common sovereign, and therefore fellow-citizens, rather than citizens of the colonies and citizens of the States which succeeded them. Mr. Chief Justice Jay first considers the status of the colonists before the Revolution, and, without specific mention of Georgia, it is of course included. Thus :

The law of Colonial times.

All the country now possessed by the *United States*, was then a part of the dominions appertaining to the crown of *Great Britain*. Every acre of land in this country was then held mediately or immediately by grants from that crown. All the people of this country were then subjects of the *King* of *Great Britain*, and owed allegiance to him ; and all the civil authority then existing, or exercised here, flowed from the head of the *British Empire*. They were in strict sense fellow-subjects, and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of *Gaul*, *Britain* and *Spain*, while *Roman Provinces*, viz. only that affinity and social connection which result from the mere circumstance of being governed by the same *Prince* ; different ideas prevailed, and gave occasion to the *Congress* of 1774 and 1775.[1]

The Chief Justice next describes the stirring events of the Revolution and its effect upon the erstwhile colonies :

Sovereignty at the Revolution passed to the people as a whole.

The Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of *Great Britain*, the sovereignty of their country passed to the people of it ; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the colony or States within whose limits they were situated, but to the whole people ; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations ; the people, nevertheless, continued to consider themselves, in a national point of view, as one people ; and they continued, without interruption, to manage their national concerns accordingly ; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it ; and then the people, in their collective and national capacity, established the present constitution.[2]

The Chief Justice, true to his conception that there were thirteen States but one people, insists in the following passage that it was the people, not the States,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 470).

[2] *Ibid.* (2 Dallas, 419, 470).

which formed the Constitution—for this contention is necessary to support his opinion that the United States formed a nation instead of a union. Thus :

The people made the Constitution.

It is remarkable, that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, ' We, the *people* of the *United States*, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country ; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments, should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner ; and the Constitution of the *United States* is likewise a compact made by the people of the *United States*, to govern themselves as to general objects, in a certain manner.[1]

' The sovereignty of the nation ' being, in the opinion of the Chief Justice, vested in the people, he then proceeds to consider, as Mr. Justice Wilson had done, the difference between the feudal conception of the State obtaining in Europe and the contractual conception of the State obtaining in the United States. First, as to the sovereignties of Europe, and second, as to the States of the Union. On the first point the Chief Justice says :

The feudal theory of jurisdiction.

It will be sufficient to observe briefly, that the sovereignties in *Europe*, and particularly in *England*, exist on feudal principles. That system considers the *Prince* as the *sovereign*, and the *people* as his *subjects* ; it regards his *person* as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority ; and from his grace and grant, derives all franchises, immunities and privileges ; it is easy to perceive, that such a sovereign could not be amenable to a Court of Justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the *Prince* having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the *Prince* and the subject.[2]

Second, as to the States of the Union :

The American people are sovereigns without subjects.

No such ideas obtain here ; at the Revolution, the sovereignty devolved on the people ; and they are truly the sovereigns of the country, but they are *sovereigns without subjects* . . . and have none to govern but *themselves* ; the citizens of *America* are equal as fellow-citizens, and as joint-tenants in the sovereignty.[3]

From these observations, the Chief Justice draws the following conclusion, with which he ends the first of the three headings under which he considers the question :

From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern ; a nation or State-sovereign is the person or persons in whom that resides. In *Europe*, the sovereignty is generally ascribed to the *Prince* ; here it rests with the people ; there, the sovereign actually administers the Government ; here, never in a single instance ; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in *Europe* stand to their sovereigns. Their *Princes*

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 471).
[2] *Ibid.* (2 Dallas, 419, 471).
[3] *Ibid.* (2 Dallas, 419, 471–2).

have personal powers, dignities and pre-eminences, our rulers have none but *official*; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.[1]

Second. The compatibility of suit with state sovereignty.

Question of the right of suit.

Given the view of the Chief Justice, that the Convention of 1787 made a nation, not a union of States; that the Constitution was ratified by the people of the different States and that these peoples together form the people of the United States, dwelling within and being citizens of the former colonies and separated merely for geographical reasons; that States were merely political units within which the people exercised their rights, and that they were merely agents of these peoples—it was easy for him to reach the conclusion that the agents could be sued when the parts, that is to say, the individuals composing them, could themselves be. For, looking through form to substance, the suit was in fact, if not in theory, a suit against individuals, who might change, living within boundaries—which in this matter were merely lines of convenience, not the frontiers of sovereign states. If a citizen of South Carolina could sue a citizen of Georgia two citizens of South Carolina could be joined as plaintiffs, and if two citizens of Georgia could be joined as defendants, three could, four could, all could; for, from this point of view, it was merely a question of mathematics. Indeed, sovereignty was not involved, for even if the State could, for purposes of argument, be considered sovereign, the individual was not, in the sense of public law; and, as it was a suit against an individual or aggregation of individuals more or less artificially grouped, the State was not involved except as to indicate in broad and general terms the locality within which these people live, move, and have their being. The State was a province, it was an inferior body politic and as suable as any other. The Chief Justice begins this section of his opinion—one almost might say argument, for he is unconsciously maintaining a thesis, as his brother Wilson consciously maintained one—by asking:

The suit is in fact against a number of individuals.

> Suability, by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not in that respect, one citizen inferior to another.[2]

The Chief Justice then proceeds to state a series of premises, from which certain conclusions inevitably flow:

> It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases, one citizen may sue forty thousand; for where a corporation is sued, all the members of it are *actually* sued, though not *personally* sued.

He then takes an example which, as is seen, is based upon the theory of inferior corporations:

Analogy of suits against city corporations.

> In this city [meaning Philadelphia, which was then the capital of the country and the seat of the court], there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of *Delaware*, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of *Delaware*,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 472).

[2] *Ibid.* (2 Dallas, 419, 472).

as on the Mayor or other Officers of the Corporation of *Philadelphia*? Will it be said, that the fifty odd thousand citizens in *Delaware* being associated under a State Government, stand in a rank so superior to the forty odd thousand of *Philadelphia*, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former?—In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in another place, be privileged to do *justice* only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of *Delaware* holds an office of superior rank to the Mayor of *Philadelphia*, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.[1]

So much for mathematics; next, as to the suability of the State as such. In this part of the argument, with which he concludes the second heading in which he grouped his observations, the Chief Justice proceeds by the favourite method of question and answer:

If there be any such incompatibility as is pretended, whence does it arise? In what does it consist?

And to this question he answers:

Suability and State sovereignty are not incompatible.

There is at least one strong undeniable fact against this incompatibility, and that is this, any one State in the *Union* may sue another State, in this Court, that is, all the people of one State may sue all the people of another State. It is plain then, that a State may be *sued*, and hence it plainly follows, that *suability* and *State sovereignty* are not incompatible. As one State may sue another State in this *Court*, it is plain that no degradation to a State is thought to accompany her appearance in this Court.[2]

The Chief Justice draws the conclusion, which as so often happens with him is to be the next step in the argument, and upon which, proceeding by question and answer, he bases a further question:

It is not, therefore, to an appearance in this court, that the objection points. To what does it point?

To this question he replies:

It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a State should be sued by *one* citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike. Nor can I observe any greater inconveniences in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority as an objection, at least *one half* of its force is done away by this fact, viz. that it is conceded that a State may appear in this Court, as Plaintiff, against a single citizen as Defendant; and the truth is, that the State of *Georgia* is at this moment prosecuting an action in this Court against two citizens of South Carolina.[3]

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 472–3). [2] *Ibid.* (2 Dallas, 419, 473).
[3] *Ibid.* (2 Dallas, 419, 473). The case to which the Chief Justice referred is *State of Georgia* v. *Brailsford et al.* (1 Dallas, 402).

Therefore, his conclusion on the second heading is as follows :

A good rule should work both ways.

The only remnant of objection therefore that remains is, that the State is not bound to appear and answer as a Defendant at the suit of an individual : but why it is unreasonable that she should be so bound, is hard to conjecture. That rule is said to be a bad one which does not work both ways ; the citizens of *Georgia* are content with a right of suing citizens of other States ; but are not content that citizens of other States should have a right to sue them.[1]

The law of the Constitution.

Third. Whether the Constitution, to which Georgia is a party, allows the State of Georgia to be sued by a citizen of another State of the Union.

This phase of the subject is susceptible, in the opinion of the Chief Justice, of a two-fold division : first, the design of the Constitution ; second, its letter and express declaration. Each of these in turn :

First, as to the design. It is to be expected, in this connexion, that the Chief Justice should appear, as it were, in a reminiscent mood, for, as a revolutionary leader, he felt the difficulties which the Congress experienced after the Declaration of Independence and before the Articles of Confederation, in persuading—for it could not compel—the States composing this informal league to comply with the recommendations of the Congress. For both the States and the Congress were revolutionary bodies, without the compass of law to guide the deliberations of the one and to control the actions of the other. As a responsible statesman, in the interval between the Articles of Confederation and the going into effect of the Constitution, he was charged with the administration of the foreign affairs of the Confederacy, and he found it difficult to conclude treaties and impossible to have their terms executed by the States when their interests appeared to be contrary to the provisions of the treaty—and there was no way, under the Articles of Confederation, of reaching the peoples of the States except through the States themselves. So keenly did he appreciate the difficulties of the situation and the impossibility of its continuance if the Confederacy itself were to endure, that he addressed the Congress on the subject, proposing a change in articles to this end, which, however, failed to produce the desired effect. It is of interest in this connexion, indeed, it is material to his argument in the case, to state that he regretted, in this letter to the Congress, the fact that there was not a court in which the laws of the Confederation could be interpreted, the application stated, and uniformity secured. And in the Federalist, which may be called the official defence of, as it has been since its appearance the standard commentary on, the Constitution, his contributions dealt with and were confined to the treaty-making power, its nature and its extent, and the necessity that it be lodged in the Union of the States. It was natural, therefore, that, in considering the design of the Constitution, he should dwell upon the international aspect, which then, as formerly, was uppermost in his mind.

First, as to the earlier period.

Lack of a national tribunal prior to the Constitution.

Prior to the date of the Constitution, the people had not any national tribunal to which they could resort for justice ; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least control. There was then no general Court of appellate jurisdiction, by whom the errors of State Courts, affecting either the nation at large, or the citizens of any other State, could be revised and corrected. Each State was obliged to acquiesce in the measure of

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 473).

justice which another State might yield to her, or to her citizens ; and that even in cases where State considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result ; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.[1]

Considering further this phase of the subject, and viewing it in its larger and international aspect—because the United States had made their formal entry into the society of nations—the Chief Justice said :

The United States and the law of nations.

Prior also to that period, the *United States* had, by taking a place among the nations of the earth, become amenable to the law of nations ; and it was their interest as well as their duty to provide that those laws should be respected and obeyed ; in their national character and capacity, the *United States* were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties ; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent. While *all* the States were bound to protect *each*, and the citizens of *each*, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done *to* each, and the citizens of each ; but also to cause justice to be done *by* each, and the citizens of each ; and that, not by violence and force, but in a stable, sedate and regular course of judicial procedure.[2]

Drawing conclusions from his own observations and experience, as summarized in the above quotations, the Chief Justice was of the opinion that ' these were among the evils against which it was proper for the nation, that is, the people of all the *United States*, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation '.[3]

The establishment of Justice.

The Chief Justice now turns to the second division of his subject—the letter and express declaration of the Constitution. After calling attention to the design of the newer and more perfect union, as happily and authoritatively stated in the preamble to the Constitution, the Chief Justice takes up and analyses ' the precise sense and latitude in which the words " to *establish justice* ", as here used, are to be understood '. As is his wont, this is stated in the form of a question, and the answer to the question will, he says, ' result from the provisions made in the Constitution on this head.' They are ten in number, and, as they are relevant to the question which confronted the Chief Justice, they are quoted in full, as not merely the analysis of what may be called the enumeration of the powers conferred upon the judiciary made by the first Chief Justice, but also the clearest statement of the aim and purpose of a Supreme Court in a Union of States, whether it be the more perfect union of the United States, the more limited union called the society of nations, or a still more restricted judicial union of the nations for the ascertainment and administration of justice between and among the members of this union :

1st. To all cases arising under this Constitution ; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the *United States* ; because as such laws constitutionally made are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority ;

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 474).
[2] *Ibid.* (2 Dallas, 419, 474).
[3] *Ibid.* (2 Dallas, 419, 474).

because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or Courts of a part of the nation. 4th. To all cases affecting Ambassadors, or other public Ministers and Consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of Admiralty and Maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the *United States* shall be a party; because in cases in which the whole people are interested, it would not be equal or wise to let any one State decide and measure out the justice due to others. 7th. To controversies between two or more States; because domestic tranquillity requires, that the contentions of States should be peaceably terminated by a common judicatory; and, because, in a free country justice ought not to depend on the *will* of either of the litigants. 8th. To controversies between a State and citizens of another State; because in case a State (that is all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national Court, than in a Court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality, being thereby obviated. Because in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid, that the latter should be the sole Judges of the justice due to the latter; and true Republican Government requires that free and equal citizens should have free, fair, and equal justice. 9th. To controversies between citizens of the same State, claiming lands under grants of different States; because, as the rights of the two States to grant the land, are drawn into question, neither of the two States ought to decide the controversy. 10th. To controversies between a State, or the citizens thereof and foreign States, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on national authority.[1]

After this elaborate introduction the Chief Justice takes up the clause of the Constitution extending the judicial power 'to controversies between a State and citizens of another State'; and he pays his respects to those who contend that this clause ought to be construed to reach none of these controversies excepting those in which a State may be plaintiff.

It will be observed that the framers of the 11th amendment to the Constitution had in mind this very contention, and the amendment itself was a direct negative, providing that the judicial power shall not be construed in this sense. The Chief Justice believes that this is to be considered as an ordinary judicial question, and to be settled by the ordinary canons of construction, and as the clause provides a remedy, it should be construed liberally in order that it might be thoroughly remedial. Mr. Justice Iredell, however, would have looked upon it not merely as a remedy, but as the creation of a right not hitherto existing which limited the action of States, and therefore to be strictly construed. However, we are dealing with the opinion of the Chief Justice, not with that of his learned and more fortunate brother, whose opinion, as has already been stated, was sustained by the amendment.

This extension of power is *remedial*, because it is to settle controversies. It is therefore to be construed liberally. It is politic, wise and good, that, not only the controversies in which a State is *plaintiff*, but also those in which a State is *Defendant*,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 475–6).

should be settled ; both cases, therefore, are within the reason of the remedy ; and ought to be so adjudged, unless the obvious, plain and litteral sense of the words forbid it.[1]

After quoting the language of the clause of the Constitution for the sake of greater clearness, and holding that, if the right of a citizen to sue a State as a defendant was not to be granted, it should and would have been excluded from the terms of the grant, the Chief Justice continued :

The word 'controversy'.

It cannot be pretended, that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no *controversy* between them. If it is a *controversy* between them, then it clearly falls not only within the spirit, but the very words of the Constitution. What is it to the cause of justice, and how can it affect the definition of the word *controversy*, whether the demands which cause the dispute, are made by a State against citizens of another State, or by the latter against the former ? [2]

This conclusion seemed to be inevitable to the Chief Justice, for, as he says in a later passage of his argument :

The word 'party'.

Words are to be understood in their ordinary and common acceptation, and the word *party* being in common usage, applicable both to *Plaintiff* and *Defendant*, we cannot limit it to *one* of them, in the present case.[3]

The Chief Justice was troubled by the fact that his argument, if logically applied, would place the United States at the mercy of a citizen and enable a single individual to hale the United States before the Supreme Court. Why not ? A citizen could sue a citizen of the United States, and if he could sue one citizen he could join two or three, and if he could join two or three, why could he not, mathematically speaking, join all of the individuals composing the United States—because, if the States were only aggregations of people, the United States were only such ? However, the Chief Justice did not advert to the mathematics of the case, but found a reason which would overcome the mathematical argument :

Can the United States be sued by its citizens ?

Candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. . . . If the word *party* comprehends both Plaintiff and Defendant, it follows, that the *United States* may be sued by any citizen, between whom and them there may be a *controversy*.[4]

The Chief Justice was aware that this objection could be urged and that it might be fatal to his argument. Instead of denouncing it or brushing it aside, he made the characteristic remark, that it appeared to him to be fair reasoning, and he countered, as it were, by adding immediately that, ' the same principles of candour which urge me to mention this objection, also urge me to suggest an important difference between the two cases.' The difference he finds to consist in this, that ' in all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgements, by the arm of the Executive power of the *United States* ',—a contention which was not borne out, as will be seen, by the United States in this very case of *Chisholm* v. *Georgia*—' but in cases of actions against the *United States*, there is no power which the Courts can call to their aid.' [5]

From this distinction important conclusions are drawn. In view of the fact that the Supreme Court has later, by a distinguished successor of the Chief Justice,

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 476). [2] *Ibid.* (2 Dallas, 419, 477).
[3] *Ibid.* (2 Dallas, 419, 477). [4] *Ibid.* (2 Dallas, 419, 478). [5] *Ibid.* (2 Dallas, 419, 478).

declared, with the unanimous approval of his brethren of the Bench that there was no power in the general government or in any department thereof to execute by force a decision of the Supreme Court against a State of the Union, this difference would seem to be more specious than real, but it was natural in a man in whose eyes the States were inferior body politics. However, the Chief Justice is entitled to his view, which he thus states :

From this distinction important conclusions are deducible, and they place the case of a State, and the case of the *United States*, in very different points of view.[1]

The Chief Justice then voices a wish, in his concluding quotation, which does him infinite credit, ' the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.' [2] The Chief Justice thereupon states, in the concluding quotation, his personal and official opinion, which must carry weight with every partisan of justice :

Arguments of policy.

For my own part, I am convinced, that the sense in which I understand and have explained the words ' controversies between States and citizens of another State ', is the true sense. The extension of the judiciary power of the *United States* to such controversies, appears to me to be *wise*, because it is *honest*, and because it is *useful*. It is *honest*, because it provides for doing justice without respect of persons, and by securing individual citizens, as well as States, in their respective rights, performs the promise which every free Government makes to every free citizen, of equal justice and protection. It is *useful*, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State ; because it obviates occasions of quarrels between States on account of the claims of their respective citizens ; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man ; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice, without any danger of being overborne by the weight and number of their opponents ; and because it brings into action, and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently, that fellow-citizens and, joint sovereigns cannot be degraded, by appearing with each other, in their own Courts, to have their controversies determined.[3]

It will be observed that Attorney-General Randolph and Justice Blair insist that a suit between A B and C B is the same as a suit between C D and A B ; but this alphabetical argument is more specious than real, and comports ill with the dignity of States. In like manner, Chief Justice Jay was greatly impressed by the fact that plaintiffs could be joined and that any number of persons as defendants could be sued by one or more plaintiffs. But the relations of States are not determined by mathematics, and the mathematical argument overlooks the question of sentiment, at the root of the State. Again, while it may be said that allowing a citizen of a State to sue another State prevents controversies from becoming acute and a resort to force, nevertheless the right of a citizen to hale a State into court creates a controversy ; and this policy is, therefore, as a two-edged sword. This fact was recognized and avoided very clearly by the Second Hague Peace Conference of 1907, which, in allowing an individual to resort to a prize court and to summon a belli-

[1] *Chisholm* v. *State of Georgia* (2 Dallas, 419, 478).
[2] *Ibid.* (2 Dallas, 419, 478).
[3] *Ibid.* (2 Dallas, 419, 479).

gerent captor before it, conditioned the exercise of this right upon the consent of the individual State, recognizing that an appeal in certain instances might not be in the interests of the State whereof he was a subject or citizen, and that, while the appeal might satisfy his claim, it might prejudice the interests of the State, of which it, not the individual, should be the judge.

Decision of the Court in favour of the plaintiff overruled by the 11th Amendment (1798).

By a vote of four to one the jurisdiction was sustained by the justices of the Supreme Court of a suit by an individual of one State against another State of the American Union. On March 5, 1794, an amendment was addressed to the legislatures of the States of the Union by the Third Congress, and on January 8, 1798, it was declared by the President in a message to Congress to have been ratified by three-fourths of the States, in accordance with the provisions of the Constitution. So that, within little more than a twelvemonth an amendment was proposed, and within less than five years the exercise of jurisdiction in such a case was proclaimed withdrawn from the Supreme Court. It would perhaps be more accurate to say that the amendment, instead of withdrawing jurisdiction, which would have admitted its prior existence, declared that the judicial power of the United States should not be construed to extend to a suit in law or equity begun by a citizen of one of the States of the Union or by a citizen or subject of any foreign State against the United States.

Importance of the controversy.

It is advisable, in view of these circumstances, to pause and to ascertain the reason of this action on the part of the States; for, if their action is not to be considered as precipitate, it nevertheless was prompt, decided, unmistakable, and to the point. It was a lesson to the Supreme Court; it was a guarantee to the States and to their citizens that jurisdiction could not be exercised in derogation of the rights of the States unless the grant of power were clear, and it was a warning to the Supreme Court, which has been heeded, that jurisdiction should not be assumed against a State by implication. The debt in the case of *Chisholm* v. *Georgia*, to recover which suit was brought against the State, was trifling in amount. The question of jurisdiction, however, was of fundamental importance. It questioned the existence of the States and their position within the Union. In this sense it was constitutional. If the States were sovereign before the Constitution, as they expressly declared themselves to be in the second of the Articles of Confederation, it was of international importance. If the decision of the Supreme Court in this case was correct, a union of nations might menace the sovereignty by virtue of which they form the Union, and a casual expression in the agreement of union, which would pass unnoticed or unchallenged if applied to an individual, might deprive the State of its prestige, even of its power, and summon it before the creature of its hands as a province shorn of its statehood.

If the opinion of the majority had prevailed, the Supreme Court would not have been the model for an international tribunal, although it might have been the model for a national tribunal. The amendment shows that the people of that day regarded their States as more than inferior bodies politic, that they were sovereign and to be considered as sovereign in the reserved powers, and that they were only deprived of the rights which they expressly granted to their agent, the general government, or which followed by necessary implication, or the exercise of which they specifically, or by necessary implication, renounced. If the opinion of the majority had prevailed, the United States would have been a nation with a single sovereignty. There would

not have been a separation of sovereign powers, some lodged with the agent to be exercised for the benefit of the United States and others reserved to the States for their individual benefit, each, as the great Chief Justice Marshall has said, being sovereign within its appropriate sphere, and neither so within the sphere of the other. The Supreme Court would not have been the prototype of an international court of justice, or it would not have been the prototype to the same extent ; for we would be dealing with States stripped of their sovereignty, whereas, because of the amendment, passed immediately to correct this exercise of jurisdiction on the part of the Supreme Court, we are dealing with States in the possession of their sovereignty, except, in so far as to them seemed good and sufficient, they divested themselves of it to their agent. The Society of Nations can, as did the States of the American Union, create an agent invested with certain powers, reserving to themselves all others ; and if this agent should, by construction, extend its powers, the action of the States of the American Union in this very matter shows that, by an amendment of the convention creating the judicial union and defining and enumerating the powers of its court of justice, an excess of zeal in the matter of justice may be easily and peaceably corrected.

Relevance of the decision to international controversies.

It is difficult to see how the justices, especially Messrs. Blair and Wilson, who had been members of the Philadelphia Convention, could have persuaded themselves that that conference of States claiming to be sovereign and exercising sovereign powers could have really meant to deprive themselves of a right possessed by any and every sovereign State, or that the conference actually did so. The case is not so strong with Justice Cushing, who was not a member of that assembly and who had passed many years of an uneventful life in the atmosphere of the court-room—for he was appointed, within a year after the Declaration of Independence, Chief Justice of the Superior Court of Massachusetts, from which he was raised to the Supreme Court of the United States. It is strange that Chief Justice Jay, although not a member of the Philadelphia assembly, could have persuaded himself that the States had grown ' virtuous ' overnight, inasmuch as his experience with them as Secretary of State must have shown the obstinacy with which they clung to the views dictated by their interests and their unwillingness to renounce a right in the interest of the Confederation. It is not too much to say that, if Madison's *Notes of Debates of the Federal Convention* had then been published, it would have been impossible for any fair-minded reader to have mistaken the temper of the States in this connexion and to have applied to them the ordinary canon of construction ; because, as a later justice of the Supreme Court has said, States have a temper of their own. Even a casual reading of Madison's *Notes* shows that the States were as flint against the surrender of their powers. They appointed, as is the case with sovereign states, as many delegates as they chose to send. They voted as States. They refused to be amalgamated. They refused to have territory carved out of their midst, without their consent, and erected into new States ; and the very phrase to which reference was made—particularly by Justice Wilson and the Chief Justice—' We, the people of the United States,' was not used by the delegates of the States in the sense in which it was pressed into the decision of the case. ' We the people of the United States ' did not mean the American people ; it meant ' we the people of the States of New Hampshire, Massachusetts ', &c. In the draft of the Constitution prepared by the committee on detail, and laid before the Convention on the 6th day of August 1787, it

Policy of the States at the Philadelphia Convention.

was so stated; and the preamble, put to a vote, was unanimously approved, without debate, and was changed by the committee on style, to which the Constitution as approved by its members was submitted for literary revision. And this particular clause of the preamble, 'we the people of the United States of New Hampshire,' &c. was framed in the fear and in the belief, which was justified, that the thirteen states forming the Confederacy would not immediately ratify that instrument, that the document if not so modified would begin with a lie, as Rhode Island and North Carolina, in the plenitude of their own sovereignty refused to ratify the Constitution, and only came into the Union after the Constitution had gone into effect, the Union had been formed, and they themselves preferred the advantages of association to the splendours of isolation. Then too, the Constitution was not submitted to the American people for their consideration. It was submitted to the States and ratified by the people of the States. On this point, it is only necessary to call attention to the first sentence of the 7th article, providing that 'the Ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same'. Although the language of the Constitution is clearly sufficient, nevertheless the authority of the great Chief Justice Marshall can be vouched, who said, for a unanimous Court in *McCulloch* v. *Maryland* (4 Wheaton, 316, 403) decided by the Supreme Court in 1819:

The Constitution was ratified by the States separately.

Remarks of Chief Justice Marshall (1819).

> This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States.

Temper of the States upon this question.

Mr. Justice Iredell knew the difference between a State and a mass of people, for the Convention of the State of North Carolina, of which he was a member, refused to ratify the Constitution, notwithstanding his earnest and urgent appeal. Chief Justice Jay should have known the temper of the States, because his own State of New York was opposed to the Constitution, and it was only after a long and bitterly contested fight that the cause of union was carried by three votes. Alexander Hamilton, as a member of the Convention of his State, was no believer in the States, and would gladly have seen them blotted out of existence and a nation rise upon their ruins; yet he knew that they would not stand a suit. James Madison, by general consent revered as the father of the Constitution, knew the temper of the States, and as a member of the Convention of his State, disclaimed the right of a citizen of a State to sue another State of the Union. John Marshall, whom a grateful posterity calls the great Chief Justice, likewise a member of his State Convention, knew that the State could not be sued by a citizen of another State even in the Supreme Court of the United States. Nay more, each knew it and stated it at the time.

Hamilton's arguments in *The Federalist* (1788).

In a series of articles in the press collected under the title of *The Federalist*, written not merely to expound the Constitution but to secure its adoption, Hamilton said on the very point involved in the case of *Chisholm* v. *Georgia*:

> It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal

courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.[1]

Madison's opinion.

In speaking of the Supreme Court, James Madison said in the Virginia Convention:

> Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. . . .
>
> It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.[2]

Marshall's opinion.

And on this very point, John Marshall, speaking with the warmth of the advocate rather than with the calm and poise of the judge, contended:

> With respect to disputes between *a state and the citizens of another state,* its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.[3]

[1] Paul Leicester Ford, *The Federalist, A Commentary on the Constitution of the United States by Alexander Hamilton, James Madison, and John Jay,* 1898, No. 81, pp. 545–6.

[2] Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* (2d. ed., 1836, reprint of 1891), vol. iii, p. 533.

[3] *Ibid.*, vol. iii, pp. 555–6.

As Chief Justice of the Supreme Court, Marshall adverted to this question, and, in the maturity of his powers and acting under a sense of judicial responsibility, restated these views in the classic case of *Cohens* v. *Virginia* (6 Wheaton, 264, 406), decided in 1821 :

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted ; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted ; and the Court maintained its jurisdiction. The alarm was general ; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases : and in these, a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

In the American system of government there is a three-fold division of powers and of functions, and while each division acts for itself and is supreme within its appropriate sphere, they are kept in check by one another, and the lines of demarcation as laid down by the Constitution maintained by the Supreme Court of the United States. The Congress legislates, that is to say, it makes the law ; the President, as the chief of the executive branch, executes the law. But as the meaning of the law is not always clear, and should be made so before resort is had to execution, the Judiciary steps in at the instance of a party in interest and declares that law, which the legislature has made and which the President is to execute, which it neither makes nor executes. And hitherto, at least, it has not been found necessary to enforce a judgement of the Supreme Court against a State.

No State has hitherto resisted the judgement of the Supreme Court.

Public opinion, based upon ' a decent respect to the opinions of mankind ', has been found sufficient.

The common law of England is declared by the Supreme Court to be the common law, in civil matters, of the United States. An international conference, such as The Hague, can recognize the common law of nations, as did the conference, limited to the western world, in 1787, without stopping to define it ; and the international conference at The Hague can legislate, that is to say, can recommend to the States, rules of law which, when adopted and ratified by the States, have for each one so doing and for the society of nations the force and effect of law. The court of the society of nations, whether it be called an international court of justice or a judicial organ of the society, can, as does the Supreme Court of the United States, declare the true meaning and intent of the common law of nations as well as of the statute or conventional law ; and that public opinion tried but not found wanting in the

Possibility of international action on similar lines.

western world, will see to it that the judgements of the tribunal of the nations are carried into effect, if only a state can recognize that it is the creature of law, and that the happiness of its people depends upon the administration of justice in the relations of states, as in the relations of individuals.

Acceptance by the Supreme Court of the 11th Amendment.

In the American system, therefore, it was as certain as it was natural that the Supreme Court would be called upon to interpret the true meaning and import of the 11th amendment; and it was no doubt a relief to the statesmen of that day, as it is a source of hope to us who believe in an international tribunal, that the justices of that court interpreted the amendment without bitterness, without passion, without the expression of feeling, even although it was couched in ungracious terms, and deprived the court of jurisdiction in a class of cases which four out of the five justices had sought to entertain. An expectant public did not have long to wait. The cases were at hand, and the court justified the expectations of its partisans.

Cases on Procedure. *Grayson* v. *Virginia* (1796).

But before this happened, two further cases, this time in equity, were decided, in which the procedure was devised, which has since been followed by the Supreme Court, in suits against States. The first was that of *Grayson* v. *Virginia* (3 Dallas, 320), decided in 1796, in which the court was asked to issue a *distringas* to compel the State to enter an appearance, Lewis for the plaintiff arguing 'from the analogy between a State and other bodies corporate, that this was the proper mode of proceeding'. The Court, however, was in doubt, and well it might be, 'whether the remedy to compel the appearance of a State, should be furnished by the Court itself, or by the Legislature', and accordingly postponed its decision.

At the next term Lewis for the plaintiff argued 'that the Court was competent to furnish all the necessary means for effectuating its own jurisdiction', but the Court, warned by the Chisholm case, moved more slowly, and cautiously confined itself to the narrow question of the proceeding before it, without venturing to decide the broader question which counsel pressed upon it. Also, Oliver Ellsworth was now Chief Justice, who, in the Federal Convention, had stood for the rights of the States as such and had with great difficulty brought about the compromise between the large and the small States, by virtue of which the more perfect Union was formed.

In the first place, the Chief Justice, speaking for the Court, examined the different branches of its jurisdiction, saying:

> After a particular examination of the powers vested in this Court, in causes of Equity, as well as in causes of Admiralty and Maritime jurisdiction, we collect a general rule for the government of our proceedings; with a discretionary authority, however, to deviate from that rule, where its application would be injurious or impracticable. The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of Courts of Admiralty and Equity, constituted on similar principles; but still, it is thought, that we are also authorised to make such deviations as are necessary to adapt the process and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration and controul, of the Legislature.[1]

Therefore, the court ordered:

> 1. . . ., That when process at Common Law or in Equity, shall issue against

[1] *Grayson* v. *State of Virginia* (3 Dallas, 320).

a State, the same shall be served upon the Governor, or Chief Executive Magistrate, and the Attorney General of such State.

2. . . ., That process of *subpoena* issuing out of this Court, in any suit in Equity, shall be served on the Defendant sixty days before the return day of the said process; and, further, that if the Defendant, on such service of the *subpoena*, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.[1]

Upon this announcement from the bench of the rules to be followed in suits against States, whether of law or equity, counsel for the plaintiff very properly withdrew his motion for a *distringas* and prayed that an *alias subpoena* might be awarded, which was 'accordingly done', on the ground that, although a *subpoena* had been issued in this case, the rule announced by the court could only operate in the future.

In this very brief case, of little more than a page in the original report, we have the nature of the process to be issued in suits at common law and in equity against States, which has been followed from that day to this.

Huger v. *South Carolina* (1797).

The second case, likewise on a bill in equity, was that of *Huger et al.* v. *State of South Carolina* (3 Dallas, 339), decided in 1797, which determined the persons upon whom process should be served, just as the Grayson case determined the nature and form of the process to secure appearance.

From the facts of the case it appeared that the *subpoena* had issued in this cause, that the affidavit of service was read, setting forth that a copy had been delivered to the attorney-general, 'and that a copy had been left at the Governor's house, where the original had, likewise, been shewn to the Secretary of the State.'[2]

On this state of facts, Justices Iredell and Chase doubted whether showing the original to the Secretary of State would have been sufficient service 'without leaving a copy at the Governor's house', but they agreed with the rest of THE COURT 'in deeming the service, under the present circumstances, to be sufficient in strictness of construction, as well as upon principle'. It was also decided that, upon proof of service of *subpoena*, the plaintiff was entitled 'to proceed *ex parte*' in the absence of the defendant, and accordingly commissions were issued to take examination of witnesses in several of the States.[3]

The decision in *Huger* v. *South Carolina* is even shorter than that in *Grayson* v. *Virginia*, as it consists of but three short paragraphs. Yet it determines the persons upon whom service can be made in behalf of a State, the sufficiency of service, and that, upon proof of service made in accordance with the rules of court, the plaintiff may proceed *ex parte* in the absence of the defendant State, to lay the evidence before the court necessary to support a judgement. As in the *Grayson* case, so in the *Huger* case, the procedure laid down has been followed from that day to this.

In 1791 Vanstophorst and others sued the State of Maryland (2 Dallas, 401) in the Supreme Court of the United States.

The facts of the case are wanting, but from the minutes of the Court it appears that the marshal thereof had, in the presence of witnesses, served a copy of the summons upon the governor, executive council, and attorney-general of the State

[1] *Grayson* v. *State of Virginia* (3 Dallas, 320–1).
[2] *Huger et al.* v. *State of South Carolina* (3 Dallas, 339–40).
[3] *Ibid.* (3 Dallas, 339, 341–2).

of Maryland. Curiously enough, the jurisdiction of the Supreme Court was not contested by Luther Martin, the Attorney-General of the State, who had stood in the Federal Convention as a bulwark against any and every encroachment upon the rights of the States, and, upon motion of Attorney-General Randolph, who appeared for the plaintiffs, Maryland was ordered to plead within two months. Nor did Martin oppose Randolph's motion to appoint a commission to examine witnesses in Holland. In any event, the case appears to have been discontinued upon the agreement of each of the litigating parties to pay its costs.

The right, therefore, of a State of the Union to refuse to appear as a party defendant or to take part in proceedings against it in the Supreme Court was not involved. But these questions were sure to arise, and as a matter of fact they arose in the first instance in questions involving the suability of States at the hands of private suitors.

The 11th Amendment held applicable to pending suits in *Hollingsworth* v. *Virginia* (1798).

The President, in his message to Congress dated January 8, 1798, proclaimed the adoption of the 11th amendment, and in the first term of court thereafter, in February of that year, the court took up and considered the case of *Hollingsworth* v. *Virginia*—similar to that of *Chisholm* v. *Georgia*, in that Hollingsworth, a citizen of a State other than Virginia, had sued that State in the Court of the States. The question is stated sufficiently by the reporter and the decision of the Court itself, without indulging in introduction or comment. First, as to the statement of the case contained in the official reports :

> The decision of the Court, in the case of *Chisholm versus Georgia* Ex'or. (2 Dall. 419), produced a proposition in Congress, for amending the Constitution of the *United States*, according to the following terms :
>
> 'The judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.'
>
> The proposition being now adopted by the constitutional number of States, *Lee*, Attorney-General, submitted this question to the Court—whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State ? [1]

As to the decision of the court :

> The Court, on the day succeeding the argument, delivered a unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state.[2]

This solemn and unanimous judgement of the Court settled the question, in so far as suits falling within its exact terms were concerned ; but cases were sure to arise, and they have frequently arisen, which did not fall within the letter, and yet seemed to do injustice to the spirit of the amendment. Attempts have been made from time to time by citizens and States to circumvent the amendment, but these attempts have invariably failed, except where the State has shown that the case is such that it might sue under the other clause of the Constitution vesting the Supreme Court with original jurisdiction of suits between States as such. These attempts may be conveniently grouped under the following headings :

Attempts to evade the Amendment classified.

1. Suits filed by States as such against States but in behalf of their citizens, not in their own behalf.

[1] *Hollingsworth* v. *State of Virginia* (3 Dallas, 378).

[2] *Ibid.* (3 Dallas, 378, 382).

2. Suits in which the State has obtained legal title to the property in question, and sues, therefore, in its own name.

3. Suits filed in a Court of the United States by a citizen against his own State.

4. Suits filed against officers or boards of States in order, through them, to reach and to control the action of the State.

Each of these will be considered in turn, with such comment as seems to be advisable, and at the conclusion of the discussion the situation will be stated in summary form created by the amendment as interpreted by the Supreme Court in the cases decided by it in the performance of its constitutional duties.

III.

ATTEMPTS BY CITIZENS OF STATES TO BRING ACTION AGAINST OTHER STATES BY METHODS OF INDIRECTION.

1. Suits filed by States as such against States but in behalf of their citizens, not in their own behalf.

1. Suits filed by States on behalf of their citizens.

New Hampshire and New York v. *Louisiana* (1883).

The cases to be discussed under this heading are two in number: the suits of New Hampshire and New York against Louisiana (108 U.S., 76) decided in 1883. As they involved one and the same question and the same defendant, they were considered by the court together, and they will be so considered in this connexion.

The facts, for present purposes, are very simple, and can be briefly stated. On July 18, 1879, the State of New Hampshire passed an act authorizing any citizen of the state owning a claim against any of the United States of America, arising upon a written obligation to pay money issued by such State, to assign the obligation for the payment of money, if due and unpaid, to the State of New Hampshire; directing an examination of such claim to be made by the attorney-general of the state and to bring action in the Supreme Court of the United States in the name of the State of New Hampshire against the State whose written obligation to a citizen of New Hampshire is outstanding, due and unpaid. The assignor of such claim was to be associated with the attorney-general in the prosecution of the case, should he so desire, was to pay all the expenses incurred by the state, and was to receive the share to which he should be entitled in case the suit was successful, after deducting therefrom the expenses to which the attorney-general might have been put in the suit.

The act of New York of May 15, 1880, was similar to, if not identical with the New Hampshire statute and need not be further referred to. On this set of facts the case, one of a very great importance, was presented, with great clearness and fullness, to the Court as became its importance, and was decided by that tribunal in the October term of 1882.

It is to be borne in mind, as it cannot be too often stated, that permission has to be obtained even by a State from the Supreme Court to file a bill or begin an action against a State of the American Union. This is necessary for several reasons, one of which is that it is a very serious matter to summon a State before the bar of a Court. It is true that the State has consented to be sued once and for all by ratifying the Constitution or by being admitted a member of the Union in accordance with the terms of the Constitution; but a suit is in derogation of the powers of the State, and therefore it is not to be vexed by a suit for light or trivial causes. Another reason

is that the Supreme Court, being a body of limited jurisdiction, must, before assuming jurisdiction, satisfy itself that the case falls within the grant of judicial power with which it is vested. Therefore in this case the question of jurisdiction met the Court as in all such cases upon the threshold, and in each case the bill was dismissed.

Judgement of the Court against the plaintiffs.

Mr. Chief Justice Waite delivered the unanimous judgement of the Court in an illuminating opinion, to be expected of one who had appeared on behalf of his government before the Geneva Tribunal and who owed the Chief Justiceship to the ability displayed by him in the conduct of the case of the United States. The Chief Justice considered the case not merely as one arising under the Constitution and as covered by the 11th amendment, but in its larger and international bearings distinguishing the State of the Union of the United States from the Nation of the Society of Nations, and thus giving to his opinion and the opinion of the Court a larger interest than it would otherwise possess.

History of the controversy reviewed by Chief Justice Waite.

The Chief Justice properly and naturally stated that the first question to be settled was whether the Court might accept jurisdiction of the suits. After quoting the appropriate clause of the Constitution referring to ' controversies between two or more States ' and ' between a State and a citizen of another State ', and referring to the provision that the Supreme Court shall have original jurisdiction in cases in which a State shall be a party, and finally quoting the material portion of Section 13 of the Judicial Act of 1789, which put these clauses of the Constitution into effect, he made a careful analysis of the case of *Chisholm* v. *Georgia*, and quoted portions of the opinions of Mr. Justice Wilson and of Chief Justice Jay. He called attention to the opening remark of Attorney-General Randolph in his argument, that he did not want the remonstrance of Georgia to satisfy him that the motion which he had made was unpopular, and that before the remonstrance was read another state, whose will would always be dear to him, had likewise condemned the bringing of the suit. Chief Justice Waite next called attention to the discussions which followed the announcement of the judgement in that case, saying :

> Prior to this decision the public discussions had been confined to the power of the court, under the Constitution, to entertain a suit in favor of a citizen against a State ; many of the leading members of the convention arguing, with great force, against it. As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the governor. This led to the convening of the general court of that commonwealth, which passed resolutions instructing the senators and requesting the members of the House of Representatives from the State ' to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States '. Other States also took active measures in the same direction, and, soon after the next Congress came together, the eleventh amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go into effect on the 8th of January, 1798.[1]

By virtue of this amendment the actual owners of the bonds and coupons for which New Hampshire and New York appeared, could not prosecute the suits in

[1] *State of New Hampshire* v. *State of Louisiana* (108 U.S. 76, 87–8).

their own names. The Chief Justice therefore said, and properly, that ' the real question, therefore, is whether they can sue in the name of the respective States, after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens '.[1] The Chief Justice, after holding the effect of the amendment to be ' that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another State ', examined the acts of the States of New Hampshire and of New York, permitting and directing that suit be brought in these cases and came to the conclusion, which was indeed inevitable, that ' while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them '.[2] By a strict construction of the language of the 11th amendment, the suits could no doubt have been maintained as the parties to them were in each case States of the American Union which, according to the Constitution, could sue and be sued in the Supreme Court. According to the spirit of the amendment it was doubtful whether this could be done, because its purpose was to prevent a State from being dragged before the Supreme Court at the instance of a citizen of another State, and if a State without interest in the suit lent its name, the individual suitor was the real, although the State might be the nominal party in interest. It did not follow that because a State could sue it could lend its capacity to its citizen, for so to do would enable the citizen to do indirectly what he was directly forbidden to do. Still, on the other hand, there was much to be said for this view, because a sovereign State is the trustee of its subjects or citizens, and a State, sovereign in the sense of international law, could then as now appear as trustee in behalf of its subjects or citizens, and it was not to be presumed that the States of the American Union declaring themselves to be sovereign, in the second of the Articles of Confederation, renounced this right or sovereignty without an express statement to that effect or language admitting of no other interpretation. The experience of the Chief Justice as counsel for the United States before the Geneva Tribunal in behalf of the citizens of the United States who had suffered by the unneutral conduct of Great Britain during the Civil War would naturally lead him to consider this aspect of the case, and counsel for the State dwelt upon it and forced it upon the consideration of the Court. The Chief Justice therefore was obliged to consider the distinction between the State of the American Union and the State of International Law, saying on this point :

The real plaintiffs are individual citizens.

It is contended, however, that, notwithstanding the prohibition of the amendment, the States may prosecute the suits, because, as the ' sovereign and trustee of its citizens ', a State is clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former. There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. As was said in the *United States* v. *Diekelman*, 92 U.S. 520, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be ' as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war '.[3]

The State as the ' sovereign and trustee of its citizens '.

[1] *State of New Hampshire* v. *State of Louisiana* (108 U.S. 76, 88–9).
[2] *Ibid.* (108 U.S. 76, 89).
[3] Ibid. (108 U.S. 76, 89–90).

It is to be noted in passing that Diekelman's claim was by joint resolution of Congress referred to the Court of Claims 'for its decision according to law'; that Diekelman, a subject of Prussia, claimed damages under the treaty of 1828 between the United States and Prussia, and that because of that fact Chief Justice Waite said in the course of his opinion on behalf of the Supreme Court: 'for all the purposes of its decision, the case is to be treated as one in which the Government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two Governments have agreed might be instituted for that purpose. We shall proceed on that hypothesis.' [1]

In a suit, therefore, by a nation on behalf of its subjects or citizens, there would be no difficulty as in International Law the nation speaks for its subjects and its right to do so is unquestioned. The learned Chief Justice, however, was of the opinion that the right to sue was the right of the nation, apparently as the alternative of diplomatic negotiation or of war, which the States had renounced by forming or entering the more perfect union under the Constitution. Thus the Chief Justice said:

The States are not nations.

All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, 'enter into any agreement or compact with another State'. Art. 1, sec. 10, cl. 3.[2]

The learned Chief Justice apparently was a little anxious about his conclusion because he proceeds to argue it. In so doing he rather belittles the States, and seeks to limit the right of a nation, which is unlimited, to appear in behalf of its subjects or citizens. Not content with denying to the American State the right which he admitted to inhere in the nation, he proceeds to cut down this right in the following manner:

There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his Commentaries on International law, vol. II., 2d ed., page 12:

'As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State.' [3]

From this it would follow that inasmuch as the citizen could not sue the State a foreigner could not; and when the right to sue under the Constitution was withdrawn by the 11th amendment, if indeed the right ever existed, it would necessarily follow that the citizen lost the right of suit. But it does not seem, however, to follow that because the citizens of a State of the American Union lost an exceptional right his State lost the right to sue, unless upon the theory that, in the American conception, the State is the agent of the individual and can have no greater right than he as principal possesses. The learned Chief Justice calls attention to the fact that under the Constitution as originally adopted, a citizen of a State could sue another State of the American Union; that in view of this fact it was unnecessary to allow the

[1] *United States* v. *Diekelman* (92 U.S. 520, 525), October term, 1875.
[2] *State of New Hampshire* v. *State of New York* (108 U.S. 76, 90).
[3] *Ibid.* (108 U.S. 76, 90).

State to appear on behalf of the individual. The State, therefore, in the opinion of the Court, divested itself of the power to appear in behalf of its citizen by giving him the power to appear directly in his own behalf, as his interest might prompt. When the right of the State was therefore withdrawn by the Constitution, and when the right of the individual to sue was withdrawn by the amendment, neither the State nor the citizen could sue in the case supposed. On this point the Chief Justice said :

Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations.[1]

If this be admitted by way of premise, the conclusion is natural enough that :

Effect of the 11th Amendment.

It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were.[2]

The effect of the amendment undoubtedly was to forbid a suit against a State by citizens of another State or of a foreign State, without the consent of the State sought to be made a party to the suit as defendant. It is not so clear as stated by Mr. Chief Justice Waite on behalf of the Court, that ' one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens '. If, however, that was the purpose of the 11th amendment and the Court was correct in its statement that a State could not create a controversy by espousing the cause of its citizen, the final conclusion of the Court is unquestionable when it says :

Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits.[3]

Importance of the decision.

The judgement of the Court in the cases of *New Hampshire* and *New York* v. *Louisiana* (108 U.S. 76) is interesting from various points of view. In the first place, it shows the very great care on the part of the Court to determine the meaning of the amendment, not only according to the letter but also according to the spirit, and its desire to give full force and effect to the intent of the amendment when ascertained. In the next place, it is interesting as showing that the Court recognized the rights of nations forming the society as distinct from the rights of the States forming the union, to appear and to litigate in behalf of their subjects or citizens. It is interesting in the third place, as showing a recognition on the part of the Supreme Court that a State is to be protected from suit unless its consent is clearly evidenced, because in dismissing the bills and declining to assume jurisdiction thereof, the Supreme Court admitted fairly and fully that the State of Louisiana, although a member of

[1] *State of New Hampshire* v. *State of New York* (108 U.S. 76, 91).
[2] *Ibid.* (108 U.S. 76, 91).
[3] *Ibid.* (108 U.S. 76, 91).

the more perfect union, did not recognize its right to be sued without its consent—a consent given in general terms in suits actually brought by a State, a consent not given in those terms, and therefore not allowed when a State, instead of appearing as party in interest, appeared in behalf of others who could not appear in their own behalf. As stated on more than one occasion, the right of a nation to appear on behalf of its subjects or citizens exists in International Law. It can be trusted to exercise this right somewhat sparingly when it remembers that what it exacts of others it must itself allow; that is to say, if it appears on behalf of its subjects it must allow other States to appear on behalf of theirs, and thus create a controversy which the Supreme Court was unwilling to allow in the cases under consideration. It might be embarrassing in the Society of Nations to allow an individual to sue a State, although it would be more convenient for the individual to conduct the process without bothering his government with it. As previously stated, the Second Hague Peace Conference reached a very happy compromise in allowing an individual to bring suit in the International Court of Prize under the supervision and direction of his State. Thus it allowed an appeal to be brought, as stated in paragraph 2 of Article 4 of the Prize Court Convention, 'by a neutral individual, if the judgment of the national court injuriously affects his property, subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place.'

Decision of Hague Conference (1907).

2. Suits in which the State has obtained Legal Title to the Property in Question, and can therefore sue in its own Name.

2. Suits filed by States with legal title to property. *South Dakota* v. *North Carolina* (1904).

The case to be considered under this heading is that of *State of South Dakota* v. *State of North Carolina* (192 U.S. 286), beginning in the Supreme Court in 1903, argued and re-argued before the justices of that august tribunal and finally decided on February 1, 1904.

For the purposes of the case it is sufficient to state that certain bonds were issued by the State of North Carolina and secured by mortgage; that the holders of the property or bonds in question were given by their owners to the State of South Dakota apparently for the express purpose of being put in suit; that by virtue of the gift the title passed from the owners to the State and that South Dakota had passed an Act presumably in anticipation of the gift, directing that the proceeds be conveyed into the public treasury, or appropriated to the State University, or to the public schools, or to State charities; that whenever suit was necessary to protect or assert the right or title of the State to any property so given, the attorney-general should take the necessary and appropriate proceedings, and that he should associate with him counsel in order fully and adequately to represent the State, to be compensated out of the proceeds of the suits or actions begun and prosecuted.

From this very brief statement it is to be assumed that the owners of the bonds for which suit was brought, presented them to the State for the express purpose of having suit brought. To distinguish the present suit from the case of *New Hampshire and New York* v. *Louisiana* (108 U.S. 76), it is to be borne in mind that the owners of the bonds divested themselves of the title; that they conveyed it absolutely and without reservation, to the State of South Dakota, because the proceeds,

if any, were to be paid into its treasury and to be used for such purposes of the State as should be determined by law. The difference between the two cases is therefore that in the former the citizens retained title, and the State sued in behalf of its citizens, whereas in the latter the State received title and sued in its own behalf and in its own interest, although the conveyance of the property in question seems to have been or may have been made for the express purpose of suing North Carolina because of its indebtedness to the original owners of the bonds in question.

Decision of the Court in favour of the plaintiff.

In delivering the opinion of the Court, Mr. Justice Brewer stated that there could be no reasonable doubt of the validity of the bonds and mortgages in controversy. This phase of the subject may therefore be eliminated. He also stated that the title of South Dakota was equally valid, and having said so, he proceeded to distinguish the case from that of *New Hampshire* v. *Louisiana*, and to show by the citation of authority that the purpose or motive of the gift was immaterial in law, if only the title passed by the gift from the owner to the State. Speaking for the Court he said :

New Hampshire v. *Louisiana* distinguished.

Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the State as representative of individual owners, as in the case of *New Hampshire* v. *Louisiana*, 108 U.S. 76, for they were given outright and absolutely to the State. It is true that the gift may be considered a rare and unexpected one. Apparently the statute of South Dakota was passed in view of the expected gift, and probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds. But the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction.[1]

After citing authority to support this statement of the law, the learned justice concluded : ' The title of South Dakota is as perfect as though it had received these bonds directly from North Carolina.' [2]

Difficulties of this nature being removed, Mr. Justice Brewer, on behalf of his brethren, thus stated the case presented to the Court for its determination :

We have, therefore, before us the case of a State with an unquestionable title to bonds issued by another State, secured by a mortgage of railroad stock belonging to that State, coming into this court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt.[3]

The question therefore arose upon the very threshold, as it always does in cases of this kind where a Court is one of limited jurisdiction : ' Has this court jurisdiction of such a controversy, and to what extent may it grant relief ? ' On this point, Mr. Justice Brewer speaking for the Court said :

The status of the donor immaterial.

Obviously that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the Federal court of a State of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another State. The question of jurisdiction is determined by the status

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 310).
[2] *Ibid.* (192 U.S. 286, 312).
[3] *Ibid.* (192 U.S. 286, 312).

of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too, the subject-matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay—and if it be justiciable does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual and by him sold or donated to the former.[1]

The right to maintain suit of course depended upon the provisions of the Constitution, in which the consent of the State to suit against it was expressly given. This being the case, and the Court having determined that the method of acquiring property is immaterial, provided it be honestly acquired by the State so that it sues in its own interest, it becomes unnecessary to consider further the case of *South Dakota* v. *North Carolina* or to mention in this connexion another and important phase of the controversy which will be elsewhere treated. For the present occasion it is therefore sufficient to say that by a gift of property to the State the owner thereof can set in motion an action which he himself could not begin against a State, and that this is a way of circumventing the spirit if not the letter of the 11th amendment. It is a way, however, that is not likely to be followed to any great extent, inasmuch as the individual loses title to the property in the very act of seeking to deprive the State thereof. This method, for the reason stated, is never likely to be popular, and fortunately in the Society of Nations it is not necessary to invest the nation with title to property in order to enable the nation to proceed against a debtor State. It would not have been necessary in this Union of American States had not the Supreme Court, per Mr. Chief Justice Waite, so held to protect States from being haled into Court for little or trifling causes, in fact though not in form, at the instance of a private citizen.

The decision not relevant to modern international questions.

It is, however, of interest, before leaving this case, to note how easy it is to do justice even against a State if the matter in dispute be property in possession of the Court, or which the Court can decree to be sold if its judgement be not complied with. Thus:

Form of the decree.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400), (no interest being recoverable, *United States* v. *North Carolina*, 136 U.S. 211), and that the same are secured by one thousand shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the Marshal of this court, directing him to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.[2]

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 312).
[2] *Ibid.* (192 U.S. 286, 321–2).

3. Suit filed in a Court of the United States by a Citizen against his own State.

3. Suit by a citizen against his own State.

Under this heading there will be considered but a single case, although a very important one, entitled *Hans* v. *Louisiana* (134 U.S. 1), decided by the Supreme Court in 1889.

Hans v. *Louisiana* (1889).

The question rose and fell with that of *Chisholm* v. *Georgia* (2 Dallas, 419), decided in 1793, although it differed from that cause of action. But notwithstanding the difference, it involved the right of an individual to sue in the Federal Court, in this instance the Circuit Court of the United States, a State of the American Union, namely, Louisiana. The plaintiff in the latter case was a citizen of Louisiana, and therefore was not covered by the wording of the Eleventh Amendment forbidding suit by a citizen of a State against another State, but the spirit of the amendment clearly forbad such a suit, inasmuch as it withdrew the right of a citizen to sue a State in the absence of its consent.

The case was the familiar one of bonds issued by a State with default in the payment of principal and interest to recover which suit was brought in the Circuit Court of the United States against Louisiana by one Hans, a citizen of that State. For present purposes the following statement of Mr. Justice Bradley in delivering the opinion of the Court is sufficient :

Decision of the Court against the plaintiff.

> The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.[1]

The circumstances of a jurisdictional nature, invoked by the plaintiff to give him a standing in Court, are likewise sufficiently stated by Mr. Justice Bradley, and they are quoted in order that this phase of the subject may be clear and the way prepared for a discussion of the effect of the Eleventh Amendment upon the right of the plaintiff to bring suit against the State :

Ground of the plaintiff's claim

> The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution, which declares that ' the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; ' and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, 18 Stat. 470, c. 137, § 1, is as follows, to wit : ' That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority.' It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it ; but it is contended that though jurisdiction does not

[1] *Hans* v. *State of Louisiana* (134 U.S. 1, 9).

exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question ; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.[1]

Mr. Justice Bradley calls attention to the decisions of the Supreme Court to the effect ' that a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States '. He adds that the relief sought by the suits in question was not against the State as such, but against the State officers who professed to act in obedience to the laws of the State, but that the Supreme Court held that the suits, virtually against the States themselves, ' were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained.' They involved, he said, cases arising under the Constitution, but notwithstanding ' they were held to be prohibited by the amendment referred to '.[2]

The plaintiff contended that he was not embarrassed by the obstacle of the Eleventh Amendment, but Mr. Justice Bradley was. His embarrassment and the embarrassment of the Court whose judgement he delivered, were twofold ; that the letter of the amendment did not forbid the suit, although the spirit did, and that it was perhaps a little forced to apply the amendment to the case and to decide it on that ground when other grounds existed for abating the suit. Mr. Justice Bradley's language on this point is quoted inasmuch as it states the relation of the amendment to the case and the respect in which it was determinative of it. Thus :

The spirit of the 11th Amendment.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read : and if there were no other reason or ground for abating his suit, it might be maintainable ; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state ; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the Judiciary Act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country.

The case to which Mr. Justice Bradley referred was that of *Chisholm* v. *Georgia* (2 Dallas 419), already considered, and, without retracing our steps, it will be sufficient to quote, in this connexion, a brief passage from the opinion of the learned Justice :

That decision . . . created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.[4]

[1] *Hans* v. *State of Louisiana* (134 U.S. 1, 9).
[2] *Ibid.* (134 U.S. 1, 10).
[3] *Ibid.* (134 U.S. 1, 10–11).
[4] *Ibid.* (134 U.S. 1, 11)

As to the effect, form, and meaning of the amendment, he has this to say :

This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits.[1]

Pursuing this subject somewhat further, the learned Justice thus proceeds :

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm* v. *Georgia* ; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion.[2] The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage ; and because the letter said that the judicial power shall extend to controversies ' between a State and citizens of another State ' ; and ' between a State and foreign states, citizens or subjects ', they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign State, to sue another State of the Union in the federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.[3]

The Constitution and contemporary opinion.

After referring to contemporary opinion as evidenced by Hamilton, Madison, and Marshall—which has already been quoted [4] in the comment upon the case of *Chisholm* v. *Georgia*, the learned Justice, speaking for the court, thus applies the amendment forbidding suits by a citizen of another State and suits by a citizen of the State itself :

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just ; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly

[1] *Hans* v. *State of Louisiana* (134 U.S. 1, 11).

[2] ' We are not unmindful of the fact that in *Hans* v. *Louisiana*, 134 U.S. 1, Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisholm* v. *Georgia*, but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the Eleventh Amendment according to its spirit rather than by its letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State. Without noticing in detail the other cases referred to by Mr. Justice Shiras in *Missouri* v. *Illinois et al.* (180 U.S. 208), it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another to enforce a property right. *Chisholm* v. *Georgia* (2 Dallas 419) was an action of assumpsit, *United States* v. *North Carolina* (136 U.S. 211) an action of debt, *United States* v. *Michigan* (190 U.S. 379) a suit for an accounting, and that which was sought in each was a money judgment against the defendant State.' Per Mr. Justice Brewer, speaking for the Court in *South Dakota* v. *North Carolina*, decided in 1903 (192 U.S. 286, 318).

[3] *Hans* v. *State of Louisiana* (134 U.S. 1, 12).

[4] *Supra*, pp. 56–59.

repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.[1]

The learned Justice thereupon proceeds to state and to show, although it does not need to be proved at this day, that, as Mr. Justice Iredell would say, the framers of the Constitution contemplated suits according to the principles of law and usage; or, as we would say to-day, justiciable disputes; that is to say, suits then regarded as proper for courts of justice. Thus:

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U.S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 288, 289, and cases there cited.[2]

After this general survey by way of introduction, Mr. Justice Bradley, still speaking for the court, declares that a suit against a State, without its consent, was neither then nor now justiciable, and he enumerates, in this connexion, the leading cases decided in the Supreme Court in which suitors have sought to circumvent this principle, and thus, directly or indirectly, to get around the 11th amendment by actions against individuals holding office under the State, or boards or other agencies of the state, in order through them to reach and to control the State itself. Thus he says:

Precedents examined.

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm* v. *Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *United States* v. *Lee*, 106 U.S. 196; *Poindexter* v. *Greenhow*, 109 U.S. 63; *Virginia Coupon Cases*, 114 U.S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.[3]

Omitting a consideration of these cases, as they will be considered in connexion with others refusing to take jurisdiction in cases in which the suits were against

[1] *Hans* v. *State of Louisiana* (134 U.S. 1, 14–15)
[2] *Ibid.* (134 U.S. 1, 15). *Ibid.* (134 U.S. 1, 16).

State officials, and therefore against the State, two brief statements may, however, be quoted as in point and peculiarly applicable to the subject in hand. The first is from the well-known decision of *Beers et al.* v. *Arkansas* (20 Howard, 527, 529), decided in 1857, in which Mr. Chief Justice Taney, speaking for a unanimous Court, laid down the principle of law and of practice applicable alike to nation and state :

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission ; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

The second statement is to be found in the case of *Cunningham* v. *Macon & Brunswick Railroad Co.* (109 U.S. 446, 451), decided in 1883, in which Mr. Justice Miller, speaking for the court, said :

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

Returning to the question at the root of the matter, that the clause of the Constitution conveying jurisdiction is to be understood of cases of a justiciable nature according to principles of law and usage, Mr. Justice Bradley re-enforces his argument by a reference to the act of Congress vesting the Circuit Courts with jurisdiction concurrently with that of the States, and in so doing refers with approval to the argument of Mr. Justice Iredell on this very point in the *Chisholm* case. Thus :

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted—an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the act of Congress by which its jurisdiction is conferred. The words are these : ' The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties,' etc.—' Concurrent with the courts of the several States.' Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions ? The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power ? It is true that the same qualification existed in the Judiciary Act of 1789, which was before the court in *Chisholm* v. *Georgia*, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard.[1]

In the course of his opinion, Mr. Justice Bradley dwelt upon the good faith of the State as the mainspring of confidence and as the guarantee for the performance

[1] *Hans* v. *State of Louisiana* (134 U.S. 1, 18–19).

of its duties. In concluding his opinion he returns to this idea, and, in words of ripe wisdom, which have not yet lost their point, he speaks not merely as the acute lawyer and impartial judge, but as the broad-minded statesman and man of affairs. Thus he concludes, in measured language :

The obligations of a State rest upon good faith

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court ; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted ; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will ; and is called upon the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.[1]

In view of the fullness and the care with which Mr. Justice Bradley examined this case in the light of authority and of practice, and in view of the fact that it was the unanimous judgement of the court—although Mr. Justice Harlan, concurring in the judgement, objected ' to many things said in the opinion ' and especially to the criticism of *Chisholm* v. *Georgia*, which he regarded as correctly decided as the Constitution then was before its modification by the 11th amendment—and in view of the further fact that the decision stands as unquestioned to-day as it was when delivered, it seems inadvisable to indulge in comment upon the circumstances of the case or the principle of law applied. For the larger purpose, however, of this analysis, some observations appear to be advisable, inasmuch as they tend to show that an international court, regarding itself as one of limited jurisdiction, holds itself within the letter of the law, and, fearful that it may, in its desire to do justice, go beyond the letter, examines the spirit to restrain itself from assuming an excess of jurisdiction. It will be recalled that Mr. Justice Bradley, speaking for his brethren, felt himself embarrassed because of the fact that the later amendment did not preclude a suit in the federal court by a citizen against his State, and expressed doubt as to whether the amendment could be properly invoked unless the case was objectionable on other grounds. Yet the spirit of the amendment precluded a suit against the State, and in the interest of the State, and to maintain it unshorn of its rights, except where it had consented to their renunciation, the court considered the spirit, and, because of the spirit, refused jurisdiction.

An international court is careful not to exceed its jurisdiction.

Again, it is to be observed with what patient care and detail Mr. Justice Bradley, speaking for the court, examined the case, lest the amendment might not be cir-

[1] *Hans* v. *State of Louisiana* (134 U.S. 1, 20–1).

cumvented ; because, if a citizen of a State could avail himself of the Circuit Court in order to bring to justice a State, whereof he was a citizen, on the ground that the Constitution or a law of the United States in this particular instance impaired, as he alleged, the obligation of contract, it would be possible for an unscrupulous plaintiff, more mindful of his profit than of the prestige of the State, to become a resident of the State against which he wished to bring action, and, because of his residence, summon the State to appear and answer his claim in the Circuit Court of the United States. This attempt, in the language of the poet of the English-speaking peoples, ' by indirection find direction out,' failed. It has always failed, and will, it is believed, always fail, for although the Supreme Court is composed of justices prone, it may be, to error as is humankind, they have always stood like a bulwark between the individual and the State, even to the extent of maintaining it, crushed and bleeding, after the Civil War, against the pretensions of the victor.

4. Suits against Officers or Boards of a State in order, through them, to reach and to control the action of the State.

4. Suits filed against State officers.

It being settled by principles of international law, applicable to the United States and to the States thereof, that neither the Union nor the member may be sued without its consent, and that the 11th amendment, forbidding a suit by a citizen of a State against another State, interpreted in the case of *Hans* v. *Louisiana* as forbidding the suit in a Circuit Court brought by a citizen against his State, any and every attempt to reach the State must necessarily fail if it be brought against the United States or the State as such. The question arises, however, if a suit against an official is to be considered as against the State. This must necessarily depend upon the facts of the case and the effect of the decision, for to hold that a suit against an official was a suit against the State would be to exempt the official from liability to the individual whom he may have injured by his improper conduct. This would be illogical and indeed unthinkable in a government of laws not of men and contrary to *United States* v. *Lee* (106 U.S. 196, 220), decided in 1882, in which Mr. Justice Miller, rejecting the contention of the United States, finely and impressively said : ' No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' Therefore, it is well settled, by a long line of decisions, beginning with *Marbury* v. *Madison* (1 Cranch, 137), decided in 1803, that an official may be compelled to perform an act or may be restrained from performing it if the act in question is prescribed or regulated by law, leaving no discretion on the part of the official. Where, however, discretion is required of him, his action cannot be controlled by the courts, inasmuch as courts are not entrusted with political but with judicial discretion to be exercised in the interpretation and application of the ' laws in the administration of justice '.

But this phase of the subject, interesting in itself, is foreign to the immediate purpose, which is to determine when an action against an official is in effect against the State, and therefore a suit against the State. The 11th amendment stands in the way and blocks every attempt of the individual to reach the State, directly or indirectly, through its official. It is the result of a century of litigation and of an

Result of the decisions.

unbroken line of precedent that, if a State is affected by suit against its official, whether or not the State is a party to the record, a federal court is without jurisdiction, and will refuse to take jurisdiction of the case because of the 11th amendment, and because of its express or implied prohibition as interpreted by the case of *Hans* v. *Louisiana* (134 U.S. 1).

Classification of the cases.

The various cases which deal with this phase of the question may be grouped under three headings :

(*a*) Cases in which the suit, although against an individual, a board, or an agent, was nevertheless held to be, in fact if not in form, a suit against the State, and therefore contrary to the 11th amendment.

(*b*) Suits against an individual, although an official, but not against the State, and therefore entertained.

(*c*) Suits against an official to restrain him from executing an unconstitutional law, which are not to be considered as against the State because the law is, in effect, null and void, and the official is regarded as acting either in his individual capacity or without the authority and colour of law.

(*a*)

Of each of these in turn :

(*a*) Cases in which the suit, although against an individual, a board, or an agent, was nevertheless held to be, in fact if not in form, a suit against the state, and therefore contrary to the 11th amendment.

In re Ayers (1887).

Midway between *Osborn* v. *Bank of the United States* (9 Wheaton, 738) and the last case on this subject, *Ex Parte* Young (209 U.S. 123), stands the great and leading case, entitled *In re Ayers* (123 U.S. 443), decided in 1887 by the Supreme Court of the United States. This case, bearing the impress of a powerful and discriminating intellect, summarizes the previous cases on the subject, and lays down the rule of law for all the subsequent cases. It will therefore be considered in lieu of the many which might be drafted into service.

The case against Rufus A. Ayers, Attorney-General of the State of Virginia, John Scott, attorney for Fauquier County, and J. B. McCabe, attorney for Loudon County, of the State of Virginia, is stated, sufficiently for present purposes, in the headnote of the case, from which the following passage is quoted :

> A bill in equity was filed by aliens against the Auditor of the State of Virginia, its Attorney-General, and various Commonwealth Attorneys for its counties, seeking to enjoin them from bringing and prosecuting suits in the name and for the use of the State, under the act of its General Assembly of May 12, 1887, against tax-payers reported to be delinquent, but who had tendered in payment of the taxes sought to be recovered in such suits, tax-receivable coupons cut from bonds of the State. An injunction having been granted according to the prayer of the bill, proceedings were taken against the Attorney-General of the State and two Commonwealth Attorneys for contempt in disobeying the orders of the court in this respect, and they were fined and were committed until the fine should be paid and they should be purged of the contempt.[1]

Decision of the Court in favour of Ayers.

Mr. Justice Matthews, who delivered the opinion of the court, thus states the case on behalf of the agents of the Commonwealth :

> The principal contention on the part of the petitioners is that the suit, nominally against them, is, in fact and in law, a suit against the State of Virginia, whose officers

[1] *In re Ayers* (123 U.S. 443, 444).

they are, jurisdiction to entertain which is denied by the 11th Amendment to the Constitution . . . [1]

Can the State be reached through its officials?

On this statement of the case it is to be observed that the question is whether the State can be reached and restrained through its officials or whether the 11th amendment forbids a suit against these officials, as striking the State over their shoulders. The Commonwealth of Virginia was not a party of record, it was not a party to this suit, and Mr. Justice Matthews quotes on this point the opinion of the Supreme Court, written by himself, in the case of *Poindexter* v. *Greenhow* (114 U.S. 270, 287), decided in 1884, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record.' Mr. Justice Matthews then refers to the opinion of Chief Justice Marshall in the case of *Osborn* v. *Bank of the United States* (9 Wheaton 738, 857), decided in 1824, as opposed to the view expressed by the court in the *Poindexter* case, if the language alone be considered, but not opposed to it if the facts of the case be considered and the language applied to that state of facts. Thus, in the matter of the 11th amendment, Mr. Chief Justice Marshall said in the Osborn case :

Precedents examined.

It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

After quoting a further passage from the opinion of the Chief Justice, conveying the impression that, in this case, the State was not a party to the record, and that the nominal were not the real defendants, Mr. Justice Matthews refers to the case of the *Governor of Georgia* v. *Madrazo* (1 Peters 110, 123, 124), decided in 1828, in which the Chief Justice explained the sense in which the party to the record was to be understood, saying :

Where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant.

Therefore, the Chief Justice held that the State was in fact, though not in form, the party to the suit, and that the circuit court had no jurisdiction in the premises.

After referring to the case of *Kentucky* v. *Dennison* (24 Howard 66) and *Cunningham* v. *Macon and Brunswick Railroad Co.* (109 U.S. 446), Mr. Justice Matthews thus concludes this phase of the subject :

Where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction.[2]

[1] *In re Ayers* (123 U.S. 443, 487).

[2] *Ibid.* (123 U.S. 443, 489).

The learned Justice then invokes, as express authorities on this point, the cases of *New Hampshire* and *New York* v. *Louisiana* (108 U.S. 76), which have already been discussed at considerable length. ' In each of those cases ', he says, ' there was upon the face of the record nominally a controversy between two States, which, according to the terms of the Constitution, was subject to the judicial power of the United States. So far as could be determined by reference to the parties named in the record, the suits were within the jurisdiction of this court ; but, on an examination of the cases as stated in the pleadings, it appeared that the State, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof, who had transferred their claims to the State for the purposes of suit.' [1] The Court, however, went beyond the record, and, discovering that citizens of the States were the real parties in interest, refused to entertain jurisdiction.

The learned Justice refers to the case of *Hagood* v. *Southern* (117 U.S. 52), in which the State was not a party to the record, but was the chief party in interest ; and to the cases of *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz* (107 U.S. 711), in the first of which it was sought by injunction to restrain the officers of the State from executing the provisions of an act of the General Assembly alleged to be in violation of the contract rights of the plaintiffs, and in the second of which to require by mandamus the appropriation of money from the State in accordance with the contract.

In these three cases the court held the suit, nominally against officials, to be in fact against the State, and declined to entertain jurisdiction. Therefore, the record is not of itself sufficient. If the State be a party to the record, jurisdiction will not be assumed, but if it is not a party to the record, the court will determine whether it is in fact the party in interest or, to quote the exact language with which Mr. Justice Matthews concludes this portion of his opinion, ' whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record.' [2]

In the opinion of the learned Justice, and also by the judgements of the Supreme Court, it makes no difference whether an act is to be performed by officers representing the State or whether the officers are to be enjoined from performing an act in their capacity as representatives of the State, for in each case the State is the party in interest and the State is immune from suit either by the letter or the spirit of the 11th amendment.

Mr. Justice Matthews next calls attention to the important distinction between contracts of a State with individuals and contracts between individual parties, showing that, in the latter case, ' the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation.' [3] Contracts of a state with individuals are different. In respect to this the learned Justice says :

By virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently

[1] *In re Ayers* (123 U.S. 443, 489–90).
[2] *Ibid.* (123 U.S. 443, 496).
[3] *Ibid.* (123 U.S. 443, 505).

withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. (*Beers* v. *Arkansas*, 20 How. 527; *Railroad Co.* v. *Tennessee*, 101 U.S. 337.) The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not too literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.[1]

Object of the 11th Amendment.

In the course of his very elaborate opinion, examining the question in all its bearings, Mr. Justice Matthews calls attention to the fact that the 11th amendment, neither in letter nor in spirit, prevents suits by individuals against state officials in their capacity as such, to restrain them from executing unconstitutional laws, because such laws have no authority and the officials claiming to act upon them do so on their own responsibility, not on the authority of the State. This phase of the question will be examined later, but a brief quotation may be made from Mr. Justice Matthews's opinion on this point, in order that the connexion between the different classes of cases may appear and be established; the learned Justice likewise points out, in the course of his opinion, that suit to compel an official to perform a duty of a ministerial kind, and involving no discretion on his part, is not within the letter or the spirit of the amendment, as has been mentioned in the general observations prefixed to this section. Thus, on the first of these points, Mr. Justice Matthews said:

Cases not within the Amendment distinguished.

> But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest.[2]

It will be recalled that, in reaching the conclusion that the court must look beyond the record and probe beneath the surface in order to discover, if need be, the real party in interest who is, in law if not in fact, the defendant, Mr. Justice Matthews referred with approval and quoted from two decisions. The first of these was the case of *Louisiana* v. *Jumel* (107 U.S. 711), decided in 1882, and the second was the case of *Hagood* v. *Southern* (117 U.S. 52), decided three years later.

The Court will look beyond the record. Precedents examined.

In the *Jumel* case, Mr. Chief Justice Waite, speaking for the court, said:

> The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of

[1] *In re Ayers* (123 U.S. 443, 505–6).

[2] *Ibid.* (123 U.S. 443, 506).

this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done ; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.[1]

And in the Hagood case, Mr. Justice Matthews, for he also spoke for the court in this case, said :

These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses ; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit and the suit is, therefore, substantially within the prohibition of the XIth amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'[2]

(*b*) (*b*) Suits against an individual, although an official, but not against the State, and therefore entertained.

In the case of *Hans* v. *Louisiana* (134 U.S. 1), previously considered, Mr. Justice Bradley, speaking for the court, cited a number of cases to the effect that the 11th amendment did not forbid the suit of an individual, within or without the State, against a State official, provided the remedy affected the individual and did not involve the State in the judgement. Among these was that of *Poindexter* v. *Greenhow*, likewise known as the Virginia coupon cases (114 U.S. 270), decided in 1884.

Poindexter v. *Greenhow* (1884). The facts of the case, in so far as they are material to the present purpose, are, that in 1871 the State of Virginia passed a funding act, issuing bonds to run for a period of years, and declaring that the coupons should ' be receivable at and after maturity for all taxes, debts, dues, and demands due the State '. In 1879 an act was passed by the State of Virginia authorizing the collection of delinquent taxes by distraint of personal property. By act of 1882 it was provided that taxes should be

[1] *State of Louisiana* v. *Jumel* (107 U.S. 711, 727–8).
[2] *Hagood* v. *Southern* (117 U.S. 52, 67–8).

paid in ' gold, silver, United States Treasury notes, National Bank Currency, and nothing else '. It appeared that one Poindexter owed the State of Virginia the sum of twelve dollars and forty-five cents for taxes on property owned by him in the city of Richmond for the year 1882 ; that the plaintiff tendered to one Greenhow, the treasurer of the city of Richmond, and the defendant in the action, forty-five cents in lawful money of the United States and coupons issued by the State of Virginia under the act of 1871 ; that the coupons and money so tendered amounted to the sum due the State by the plaintiff for taxes ; that the defendant refused to receive the coupons and money so tendered ; that the defendant, believing himself authorized, under the acts of 1879 and of 1882, entered the ' plaintiff's place of business in said City, levied upon and took possession of a desk, the property of the plaintiff now sued for, for the purpose of selling the same to pay the taxes due from him '. Upon suit brought for the desk, which was of the value of thirty dollars, judgement was entered in favour of the defendant.

Upon this statement of facts it is to be observed that the plaintiff, Poindexter, raised the federal question, that the act of 1882, requiring payment of taxes in gold or silver, was an impairment of a contract created by the act of 1871 between the State of Virginia and the holder of the coupon, and that, because of the federal question, the plaintiff was entitled to bring suit for the recovery of his property in the federal court. It is also to be observed that the defendant, Greenhow, claimed to be acting as an official of the State of Virginia, and in pursuance of a law of the State requiring him to distrain the property of the plaintiff if the taxes in question were not paid in gold or silver. It may be said, in passing, that a tender legally made is equivalent to payment, so that if the act of 1882 impaired the obligation of contract created by the act of 1871, there was, after the tender in accordance with the act of 1871, no debt due and outstanding and unpaid by the plaintiff ; and that therefore the seizure of the plaintiff's property was unlawful.

Leaving out of consideration that part of the case relating to the tender, which was held to be sufficient, and the decision of the court that the act of 1882 was in fact an impairment of the contract created by the act of 1871, and therefore null and void, the question arises as to whether the suit brought by the plaintiff against the defendant as an official of the State was in effect, though not in form, against the State, and therefore in violation of the letter or spirit of the 11th amendment.

Decision of the Court in favour of the plaintiff.

After having passed upon what may be considered the preliminary questions, which are irrelevant to the present purpose, Mr. Justice Matthews said :

Case for the plaintiff summarized.

The case, then, of the plaintiff below is reduced to this. He had paid the taxes demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another. That an action of detinue will lie in such a case, according to the law of Virginia, has not been questioned. The right of recovery would seem to be complete, unless this case can be met and overthrown on some of the grounds maintained in argument by counsel for the defendant in error.[1]

Poindexter v. *Greenhow* (114 U.S. 270, 282).

Case for the defendant based on the 11th Amendment.

After enumerating the various defences urged on behalf of the defendant, the learned Justice stated the chief defence, and the one for which the case is here considered:

that the suit of the plaintiff below could not be maintained, because it is substantially an action against the State of Virginia, to which it has not assented;[1]

that because the defendant was an official of the State, acting in his capacity as such and under the law of the State, the State is liable for the wrong, if any had been committed, but is exempted from suit by the 11th amendment of the Constitution of the United States. Mr. Justice Matthews thereupon proceeded to define the relation which the amendment sustained to the Constitution, that is, that the Constitution is to be taken with the amendment as an integral part of the document and not an addition to it, and to be construed in harmony with its other provisions, and to be given an equal, but no greater, effect. He stated, and rightly, that each of the provisions of that venerable instrument—now the oldest existing constitution of any member of the society of nations—is to be given its full force and effect; that the immunity of the State from suit cannot protect a State passing a law impairing the obligation of contracts, for, although the State cannot be sued, if it pass such a law, nevertheless an agent of the State seeking to enforce it may, as otherwise the government under the Constitution would be a government of men, not of laws. The distinction suggested in this connexion is drawn, stated, and defended in the latter portion of the opinion, but it is not destroying the sequence of the opinion or the process of the reasoning to discuss it here. The point involved is that a radical and fundamental difference exists between the government, on the one hand, and the State, on the other; that the State, as a body corporate, is not to be sued without its consent; and that a suit affecting it, although it be not a party to the record, is nevertheless to be considered as a suit against the State and therefore forbidden by the 11th amendment. But the government is not the State; it is an agent charged with the performance of duties imposed upon it by law, and the failure to perform a duty renders the official liable in a suit at the instance of the party in interest, unless it be of a discretionary nature affecting the State. If, however, the act of the official is not prescribed by law, or is not in accordance with law, he is individually liable, and suit against him does not affect the State, even although he be a member of the government. Again, in the case of an act based upon a law, which is unconstitutional, and therefore non-existent, the suit against an official is a suit against him personally, as he cannot be protected by a non-existent law. A suit against him under such circumstances cannot be a suit against the State, which may be considered as having attempted, but as not having enacted, the law. A familiar and a striking illustration of this, not referred to by the learned Justice, is supplied by the case of *Little* v. *Barreme* (9 Cranch, 169), in which Mr. Chief Justice Marshall, speaking for the court, held that a naval officer, obeying the orders of the President, was nevertheless liable in tort if, in so doing, he violated the law of the United States. For, as Chief Justice Marshall said on another occasion (*Marbury* v. *Madison*, 1 Cranch, 137), this is a government of laws, not of men.

Relation of the Amendment to the Constitution.

Distinction between a State and its government.

We are now prepared for Mr. Justice Matthews's distinction between the govern-

[1] *Poindexter* v. *Greenhow* (114 U.S. 270, 285).

ment on the one hand and the State on the other—a fundamental distinction, recognized by the Declaration of Independence, and a fundamental distinction that must one day enter into the life and thought of the world. Thus, he said :

In common speech and common apprehension they are usually regarded as identical ; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative ; but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in *Langford* v. *United States* (101 U.S. 341), that the maxim, that the king can do no wrong, has no place in our system of government ; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.[1]

After having pointed out the distinction in a measured passage, which cannot be too often quoted, and should be written in letters of gold, Mr. Justice Matthews thus continues :

Political importance of the distinction.

This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State ; to say *L'État c'est moi*. Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them ; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect ? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State ? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked ; and of communism, which is its twin ; the double progeny of the same evil birth.[2]

The relevancy of this line of argument of the learned Justice is at once seen, when it is remembered that the official in this case invoked a law of the State impairing the obligation of contract, which the State itself could not pass. For when the plaintiff took the bond and coupon in question, he took it with the contract between the State, on the one hand, and himself, on the other, that it should be receivable by the authorities of the State in the payment of his tax. The act of 1882 sought to impair this obligation, which a State cannot do ; because, in the Constitution, it denounced the power so to do. Therefore, when the defendant claimed to

[1] *Poindexter* v. *Greenhow* (114 U.S. 270, 290).

[2] *Ibid.* (114 U.S. 270, 291).

act on behalf of the State, refusing the coupon and distraining the property of the plaintiff, he stood without the protection of law and committed a tort, for which he was liable and must be liable in any government of laws, not of men. As Mr. Justice Matthews said :

The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been. The argument, therefore, which seeks to defeat the present action, for the reason that it is a suit against the State of Virginia, because the nominal defendant is merely its officer and agent, acting in its behalf, in its name, and for its interest, and amenable only to it, falls to the ground, because its chief postulate fails. The State of Virginia has done none of these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without her authority, but contrary to her express commands. The plaintiff in error, in fact and in law, is representing her, as he seeks to establish her law, and vindicates her integrity as he maintains his own right.[1]

The defendant not an agent of the State when acting illegally.

Therefore the learned Justice said, and was justified in saying :

Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the State. The State is not named as a party in the record ; the action is not directly upon the contract ; it is not for the purpose of controlling the discretion of executive officers, or administering funds actually in the public treasury, as was held to be the case in *Louisiana* v. *Jumel* (107 U.S. 711) ; it is not an attempt to compel officers of the State to do the acts which constitute a performance of its contract by the State, as suggested by a minority in the court in *Antoni* v. *Greenhow* (107 U.S. 769, 783) ; nor is it a case where the State is a necessary party, that the defendant may be protected from liability to it, after having answered to the present plaintiff.[2]

The State not a party to the action.

(*c*) Suits against an official to restrain him from executing an unconstitutional law, which are not to be considered as against the State because the law is, in effect, null and void, and the official is regarded as acting either in his official capacity or without the authority and colour of law.

(*c*)

The case of *Poindexter* v. *Greenhow*, which has been discussed at considerable length, leads naturally to the phase of the subject to be discussed under the present heading, for in that case the plaintiff sought to recover his property, a desk, of the value of thirty dollars, unlawfully seized, and therefore unlawfully in the possession of the defendant, and which the defendant unlawfully refused to return to him. The case now to be considered under this heading differs, indeed, in form, but not in substance. The plaintiff seeks to enjoin a State official from acting under a statute of the State, which has been declared unconstitutional, lest he be deprived of his property by the act of this official under pretence of law. The case in question is known as *Ex parte Young* (209 U.S. 123), decided in 1907 by the Supreme Court. For present purposes a brief statement will suffice.

Ex parte Young (1907).

The State of Minnesota passed an act in 1907, by virtue of which railroad companies were to adopt and publish certain rates as specified in the act, and prescribed penalties for the failure to do so. Alleging that the Attorney-General of the State, Mr. Edward T. Young, was about to bring action under the law, which they

[1] *Poindexter* v. *Greenhow* (114 U.S. 270, 293). [2] *Ibid.* (114 U.S. 270, 293).

considered unconstitutional and which was declared so to be by the courts, the railroads filed certain suits in equity in the Circuit Court of the United States for the district of Minnesota, in order, among other things, to have Attorney-General Young enjoined from prosecuting them under the terms of the act. He was so enjoined; but, notwithstanding the restraining order, the Attorney-General, the day following the injunction, began proceedings in a court of the State against the Northern Pacific Railway Company. This company thereupon laid the facts before the United States Circuit Court, which ordered Mr. Young to show cause why he should not be punished for contempt in starting proceedings in violation of the temporary injunction issued by the Circuit Court in the case then and there pending. By way of answer, the Attorney-General disclaimed any intention to treat the court with disrespect, and stated that he began the proceedings in the belief that the injunction against him as Attorney-General unlawfully interfered with the performance of his discretionary and official duties, that it was in conflict with the 11th amendment, as interpreted by the Supreme Court of the United States; and that his purpose in beginning the proceedings was for the sole purpose of enforcing the law of the State of Minnesota. Whereupon, the Circuit Court of the United States issued its order adjudging him in contempt.

Decision of the Court asserting the jurisdiction.

On this state of facts the case came before the Supreme Court as a suit on the part of individuals against the State of Minnesota, in that the Attorney-General was an officer of the State. Mr. Justice Peckham, who delivered the opinion of the court, recognized the full import of the case as one alleged to be in effect against a State of the Union, saying that 'it is a question, however, which we are called upon, and which it is our duty, to decide'. It was of good augury that, upon the very threshold of his opinion, he invoked the authority of Chief Justice Marshall, who said under like circumstances in the leading case of *Cohens* v. *Virginia* (6 Wheaton, 264, 404):

> It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.

The State act complained of held to be unconstitutional.

After considering the provisions of the act relating to the enforcement of the rates for freight or passengers, the enormous fines and possible imprisonment upon failure to comply with these provisions—although the result of testing their constitutionality in a court of justice—the Supreme Court declared that the acts, because thereof, were unconstitutional on their face; that the court, therefore, had power to determine whether the rates were or were not confiscatory, and, if it determined that they are, that it had power permanently to enjoin the railroads from putting them into effect, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect. The question, therefore, before the Supreme Court was as to the power of the Circuit Court to enjoin the Attorney-General from

bringing suit against the companies under the law in order to enforce its provisions, to inflict them with its pains and to saddle them with its penalties.

In the consideration of this case, the Attorney-General invoked the protection of the 11th and 14th amendments to the Constitution, with the first of which we are sufficiently familiar, the 14th providing that no State shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. As the case rises or falls, in so far as suit against the Attorney-General is concerned, and as indeed the case turned upon the 11th amendment, it alone will be considered.

Precedents examined

In speaking of the 11th amendment, Mr. Justice Peckham, speaking for the court, analysed its terms, and thus referred to the earlier cases upon the subject, with which the reader is already familiar:

It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hans* v. *Louisiana* (134 U.S. 1). It was adopted after the decision of this court in *Chisholm* v. *Georgia* (1793), 2 Dall. 419, where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn* v. *United States Bank* (1824), 9 Wheat. 738, 846, 857, which held that the Amendment applied only to those suits in which the State was a party on the record. In the subsequent case of *Governor of Georgia* v. *Madrazo* (1828), 1 Pet. 110, 122, 123, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn* v. *United States Bank, supra*, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the state government), the State might be considered as the party on the record (page 123), and therefore the suit could not be maintained.[1]

After referring to the cases of *Davis* v. *Gray* (16 Wall. 203, 220), *Poindexter* v. *Greenhow* (114 U.S. 270, 296), *Hagood* v. *Southern* (117 U.S. 52, 67), and especially to *In re Ayers* (123 U.S. 443), in which the cases upon the subject were, as the court said, reviewed, *U.S.* v. *Lee* (106 U.S. 196), and still other cases, the court quoted with approval the following passage from the case of *Smyth* v. *Ames* (169 U.S. 466, 518), decided in 1898:

It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment.

And after citing various cases in which the doctrine, summarized in *Smyth* v. *Ames*, is referred to, reiterated, and approved, Mr. Justice Peckham restates the doctrine of the court and practically decided the question before it:

and summarized.

The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.[2]

[1] *Ex Parte Young* (209 U.S. 123, 150).

[2] *Ibid.* (209 U.S. 123, 156).

In a later portion of his judgement, the learned Justice, speaking for the court, notices an objection made to the assumption of jurisdiction in cases of this kind, and in apt terms brings the decision of this case within the first holding of the court in *Osborn* v. *United States Bank*, in which the opinion was delivered by Chief Justice Marshall, and within the Ayers case, standing, as already stated, between the two extremes :

> Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts.
>
> And, again, it must be remembered that jurisdiction of this general character has, in fact, been exercised by Federal courts from the time of *Osborn* v. *United States Bank* up to the present ; the only difference being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn case*, an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject-matter. In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, when the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the State is, in reality, no more involved in one case than in the other. The State cannot in either case impart to the official immunity from responsibility to the supreme authority of the United States. See *In re Ayers*, 123 U.S. 507.[1]

Jurisdiction of the Court to grant injunctions.

The nature and effect of the 11th amendment have been considered in some detail, although but a few of the many cases have been cited, much less discussed. The purpose in hand has been twofold : to show the reason for the amendment and how, in its application, it administers justice in a vast domain without allowing the States to be sued either by their citizens or by the citizens of other States. There is, however, a larger and a further purpose evident, it is believed, in this discussion : that the Court of the States, created by them as their agent, in which they have consented to be sued, and endowed with a limited jurisdiction, has proved itself worthy of confidence, and that its members have stood, as it were, upon the threshold, weighing with even hand the claims of State and of citizen in the scales of justice.

Policy of the Supreme Court in interpreting the 11th Amendment.

The distinction proclaimed in immortal terms in the Declaration of Independence between States composed of people and government created as the agent of these people for certain defined purposes has entered the halls of justice and is deeply imbedded in the decisions of the court. The State, representing the people, should

[1] *Ex Parte Young* (209 U.S. 123, 166–7).

not be vexed for light or trifling reasons ; the agents of the people and of the body politic, which we call the State, should be held to a strict accountability. The court of the twelve or thirteen struggling States is to-day the court of forty-eight States of imperial extent and embracing wellnigh a continent. It is still, however, the court of justice of the fathers, administering the law in its spirit as well as in its letter, laid down by them, without fear or favour, without respect of persons or of States. And likewise in the matter of the 11th amendment, it has, it is believed, justified not only the hopes of its framers but has shown itself to be a safe and a sure guide, the veritable prototype of that larger Court whereof the Society of Nations stands in need, and with which it must one day be endowed, if the disputes of a justiciable character, determined by the Court to be such, are to be settled by that due process of law which carries, and which alone carries, in its train peace between nations.

The Supreme Court the prototype of an international Court.

There is in many quarters a desire for a Court of the Nations which shall assume jurisdiction of commercial disputes to be brought before it by citizens or subjects against the nations. It is believed that the Nations forming the society thereof will be as unwilling as the States forming the judicial union of the United States have been unwilling to appear in court and to litigate a case at the behest of a foreign citizen or subject. The origin, the nature, the history, and the experience of the 11th amendment are enlightening. Should the nations consent to be sued in a Court of their making by the citizens or subjects of other States, they would, it is believed, wisely limit their appearance to suits brought with the approval of the responsible authorities of the states whereof the suitors are citizens or subjects. In this way justice would be done, but only after the deliberation required in matters international ; for in the Court of the Society, as well as in the Court of lesser bodies, *de minimis non curat lex.*

IV.

QUESTIONS OF JURISDICTION, PROCEDURE, APPEARANCE OF DEFENDANT STATE. THE FIRST FINAL JUDGEMENT.

1. State of New York v. State of Connecticut.

(4 Dallas, 1) 1799.

The opening lines of the report in this case of first impression read :

A boundary dispute arising out of private litigation in *Fowler* v. *Lindsey*.

' The State of *New-York*, one of the *United States* of *America*, by *Josiah Ogden Hoffman*, the attorney-general of the said state,' filed this bill in consequence of the rejection of the motion to grant writs of *certiorari*, for the removal of *Fowler et al.* v. *Lindsey et al.* and *Fowler et al.* v. *Miller* (3 Dall. 411) from the Circuit Court of Connecticut into the Supreme Court. The plaintiffs in those suits were made defendants to the present bill ; and the complainant, after setting forth the title of *New-York* to the lands in question, prayed (*inter alia*) for an injunction against them. The notices to the defendants, that the injunction would be moved for, were delivered on the 25th and 26th of July ; but, on the 6th of *August*, *Ingersoll*, who appeared for the individuals, though not for the state, referred to the act of congress, which provides, that ' no writ of injunction shall be granted, in any case, without reasonable previous notice to the adverse party, or his attorney of the time and place of moving for the same : ' 2 *vol.* 228, s. 5. *Swift's edit.* And he contended, that reasonable notice had not been given in this case.

Each State had granted the same land to different persons.

The facts in the case were, that a strip of land in controversy was claimed by New York and by Connecticut, and each of these States had made grants to various persons of the territory in dispute, who were the plaintiffs and defendants in an action tried in the Circuit Court of Connecticut referred to in the quotation. The *certiorari* was refused because the State was not a party to the record, and the injunction, as will be seen, was denied in this case because the State was not interested in the ejectments. These cases should first be considered, inasmuch as it is because of them that the first suit was brought between the States of the American Union.

The suits in question, in the nature of ejectments, were begun in the Circuit Court for the district of Connecticut to recover a tract of land forming a part of the Connecticut Gore, which that State had granted to two citizens thereof, who in turn conveyed it to the plaintiffs. The defendants, inhabitants of the State of New York, alleged that the lands for which the suits were brought lay in the County of Steuben in that State, and that therefore only the Circuit Court for the district of New York or the courts of that State could take cognizance of the actions. In reply, the plaintiffs alleged that the premises lay in the State of Connecticut, and the issue was joined.

Counsel maintains that the States are the real parties.

It seemed to the counsel and it likewise appeared to the court that the suits, virtually in fact if not in name, were between the States of Connecticut and New York, and the counsel appearing for the parties plaintiff and defendant argued the case on that theory ; but the judges of the Supreme Court participating in the case did not incline to this view. As in the case of *Chisholm* v. *Georgia* (2 Dallas, 419) each judge delivered his opinion *seriatim*, and it will be observed from the report that the Chief Justice, Oliver Ellsworth, refused to take part in the decision because of the interest of Connecticut in the suit, whereof he was a citizen, and Justices Chase and

Iredell, then members of the court, were absent, as the report shows, ' on account of indisposition.'

Decision of the Court that the States are not the parties.

In deciding the case, Mr. Justice Washington, a sound judge and a nephew of the first President, said :

Without entering into a critical examination of the Constitution and laws, in relation to the jurisdiction of the Supreme Court, I lay down the following as a safe rule : That a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, must be a case in which a State is either nominally, or substantially, the party. It is not sufficient, that a State may be consequentially affected.[1]

After laying down this principle, which goes to the root of the matter, and which is the law of the United States to-day as it was when Mr. Justice Washington first declared it to be so, the learned Justice thus proceeded :

It is not contended, that the States are nominally the parties ; nor do I think that they can be regarded as substantially the parties to the suits : nay, it appears to me, that they are not even interested, or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil, they may contest it, at any time, in this Court, notwithstanding a decision in the present suits ; and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision, as to the former object, between individual Citizens, can never affect the right of the State as to the latter object : it is *res inter alios acta*.[2]

The question seemed so important to Mr. Justice Washington, that he indulged in illustrations, which have lost neither their point nor their applicability with time. Thus, he said :

For, suppose the Jury in some cases should find in favor of the title under *New-York* ; and, in others, they should find in favor of the title under *Connecticut*, how would this decide the right of jurisdiction ? And on what principle can private citizens, in the litigation of their private claims, be competent to investigate, determine and fix, the important rights of sovereignty ? [3]

As was the custom of the day, the learned judge proceeds to answer his own questions, and in so doing he illuminated the subject and suggested a practice since followed by the august tribunal of which he was a member :

The question of jurisdiction remaining, therefore, unaffected by the proceedings in these suits, is there no other mode by which it may be tried ? I will not say, that a *state* could sue at law for such an incorporeal right, as that of sovereignty and jurisdiction ; but even if a Court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a Court of Equity. The State of *New-York* might, I think, file a bill against the State of *Connecticut*, praying to be quieted as to the boundaries of the disputed territory ; and this Court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries. There being no redress at law, would be a sufficient reason for the interposition of the equitable powers of the Court ; since, it is monstrous, to talk of existing rights, without applying correspondent remedies.[4]

Mr. Justice Patterson, who was not a member of the Court when the *Chisholm* case was tried, stated the reason why counsel wished to have the record certified to the Supreme Court, saying on this point :

The argument proceeds on the ground of removing the cause into this Court, as having exclusive jurisdiction of it, because it is a controversy between States.[5]

[1] *Fowler* v. *Lindsey* (3 Dallas, 411, 412).
[2] *Ibid.* (3 Dallas, 411, 412).
[3] *Ibid.* (3 Dallas, 411, 412).
[4] *Ibid.* (3 Dallas, 411, 413).
[5] *Ibid.* (3 Dallas, 411, 413).

On this phase of the subject the learned justice expressed the following opinion :

The constitution of the *United States*, and the act of Congress, although the phraseology be somewhat different, may be construed in perfect conformity with each other. The present is a controversy between individuals respecting their right of title to a particular tract of land, and cannot be extended to third parties or states. Its decision will not affect the State of *Connecticut* or *New-York* ; because neither of them is before the Court, nor is it possible to bring either of them, as a party, before the Court, in the present action. The state, as such, is not before us.[1]

Mr. Justice Cushing, an original member of the court, who participated in the *Chisholm* case, reiterates, in the opening sentence of his opinion, his view in that case, saying :

These motions are to be determined, rather by the Constitution and the laws made under it, than by any remote analogies drawn from English practice.[2]

After this blunt statement, he continues :

Both by the Constitution and the judicial act, the Supreme Court has original jurisdiction, where a State is a party. In this case, the State does not appear to be a party, by any thing on the record. It is a controversy or suit between private citizens only ; an action of ejectment, in which the defendant pleads to the jurisdiction, that the land lies in the State of *New-York*, and issue is taken on that fact.

Whether the land lies in *New-York* or *Connecticut*, does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend on very different words, charters and foundations. A decision of that issue, can only determine the controversy as between the private citizens, who are parties to the suit, and the event only give the land to the Plaintiff or Defendant ; but could have no controuling influence over the line of jurisdiction ; with respect to which, if either State has a contest with the other, or with individuals, the State has its remedy, I suppose, under the Constitution and the laws, by proper application, but not in this way ; for she is not a party to the suit.[3]

Motions for *certiorari* dismissed.

The court therefore dismissed the motions, on the ground that the cases could not be removed to the Supreme Court on the plea of original jurisdiction, and on the further ground that the record would only be certified to the Supreme Court when the superior court had jurisdiction of the case, as it did not on the pleadings appear to have, and when a fair and impartial trial could not otherwise be obtained.

Injunction claimed by New York to stay the private suits.

To return to the case of *New York* v. *Connecticut*. Having failed to have the record certified to the Supreme Court, the State of New York filed its bill in equity in the Supreme Court against the State of Connecticut, in order to enjoin the parties to the suits of *Fowler* v. *Lindsey* and *Fowler* v. *Miller* from proceeding with those cases, on the ground that the States of New York and Connecticut were the parties in interest, and, because of that fact, the question at issue between them could only be determined in the Supreme Court, which, by the Constitution, possessed original jurisdiction in such matters. This phase of the question is purely technical and can be easily disposed of.

To the objection taken that the notice for the injunction was not reasonable the Court said, by the mouth of Ellsworth, Chief Justice :

The prohibition contained in the statute, that writs of injunction shall not be granted, without reasonable notice to the adverse party or his attorney, extends to

[1] *Fowler* v. *Lindsey* (3 Dallas, 411, 413–14).
[2] *Ibid.* (3 Dallas, 411, 414).
[3] *Ibid.* (3 Dallas, 411, 414–15).

injunctions granted by the Supreme Court or the Circuit Court, as well as to those that may be granted by a single Judge.

The design and effect, however, of injunctions, must render a shorter notice, *reasonable* notice, in the case of an application to a Court, than would be so construed, in most cases of an application to a single Judge: and until a general rule shall be settled, the particular circumstances of each case must also be regarded.

Circumstanced as the present case is, the notice, which has been given is, in the opinion of the Court, sufficient, as it respects the parties against whom an injunction is prayed.[1]

This ruling of the court, however, merely decided that the notice to the adverse party of the motion was reasonable and sufficient. It did not affect the merits of the case, for counsel and judge were devising machinery for the conduct of suits between States.

2. State of New York v. State of Connecticut.

(4 Dallas, 3) 1799.

A second phase of the case which should be separately entitled, but is not by the reporter, involved the question not merely whether reasonable notice had been given; but supposing, as decided by the court, that the notice was reasonable, should the injunction prayed for be issued at the instance of New York against Connecticut?

Arguments for New York in support of the claim for an injunction.

The bill filed by the State on behalf of New York contained an historical account of the title to the soil and jurisdiction of the tract of land in dispute. It set forth the agreements of November 28, 1683, between the two States on this subject, and it prayed 'a discovery, relief, and injunction to stay the proceeding in the *Connecticut* ejectment'; that is to say, the cases of *Fowler* v. *Lindsey* and *Fowler* v. *Miller*. The State of Connecticut, however, did not appear, and the question of an injunction was the only one argued. Attorney-General Hoffman, who had represented the State of New York in the previous phase, again appeared for his State, and, after stating the facts, indulged in a line of argument common in cases between private suitors.

In the first place, he called attention to the agreement of November 28, 1683, between the States, admitting that the tracts of land in question belonged to New York; that Connecticut 'has since undertaken to grant a part of it to the plaintiffs in the ejectments'; that it was necessary to make the plaintiffs parties to the present suit; that plaintiffs, suing in Connecticut, under grants from that State, possessed the legal title and would necessarily prevail in a court of law; and that all parties in interest should be made parties to the suit in order that the specific performance of the agreement decreed against Connecticut should bind all persons affected by the decree.

In the next place, he urged that the injunction would prevent a multiplicity of suits, inasmuch as, by the trial of this one case, the question of title would be settled for all parties; otherwise, each party in interest might bring his action in a court of law, and only the parties to it would be bound by the judgement. It was, therefore, in his opinion, emphatically a bill of peace.

In the third place, it was a bill for the discovery of title; and finally, it was

[1] *State of New York* v. *State of Connecticut* (4 Dallas, 1, 2).

a bill to settle the question of boundary between two States. In this point he is reported to have said :

Of this question, the Court can, incontestably, take cognizance ; and it will not allow the decision of the principal matter to be interrupted, or prevented by collateral considerations ; particularly, when the decision of the principal, will settle all the inferior matters in dispute. In *Penn* v. *Baltimore*, 1 Vez. 454, the bill was sustained upon similar principles ; and the jurisdiction there assumed upon principle, in a case of contested provincial boundary, may surely be exercised here under the additional sanction of the constitution. (2 Dall. 442, 415, 419 ; 3 Dall. 1, 412.) But it is not simply a bill to settle a question of boundary between two states ; it involves the right of soil, which, in relation to a great part of *New-York*, results from the right of jurisdiction ; so that, deciding the latter, is virtually a decision of the former.[1]

In the course of Mr. Hoffman's argument, the court interposed, and put and answered some embarrassing questions. Thus, on the matter of discovery, Mr. Justice Washington asked: ' Does the bill state, that the plaintiff is ignorant of the defendant's title ? ' to which Mr. Hoffman answered, ' Yes, expressly '. Whereupon, Mr. Justice Washington removed the foundation upon which he was building his structure with the remark : ' Then you are aware, that if the injunction should be granted, upon that ground, it must, of course, be dissolved, as soon as the discovery is obtained '. On the question of ownership of soil and jurisdiction, Mr. Justice Patterson informed counsel that, ' Generally speaking, the proposition is true, that, as to states, jurisdiction and the right of soil go together '.[2]

Argument for Connecticut that the States are not interested in the private suits.

Mr. Ingersoll, who had contested the reasonableness of the notice, likewise appeared in this phase of the case against the injunction, and in the course of his argument he dwelt upon the fact, which won favour with the court, that the State of New York was not a party to the case below, and that it would be unaffected by the judgement in the actions of ejectment, as stated by the Supreme Court in the cases of *Fowler* v. *Lindsey* and *Fowler* v. *Miller*. ' In the suits below,' he said, ' the state of *New-York* is not a party, and cannot be affected by their decision ; while the defendants below are not parties to the present bill, though they are the persons most likely to be injured by those suits '.[3]

Obiter dicta of the judges.

After speaking of the question of ownership of the land, he approached the question apparently of greatest interest to the judges, that the boundary of the State could not be decided as between the States in the Circuit Court. On this point various members of the Court expressed their opinions, apparently in the course of the argument. Thus, Mr. Chief Justice Ellsworth said :

If the bill contains no averment of a right of soil in *New York*, I think, it must be defective, and lays no foundation for an injunction. To have the benefit of the agreement between the states, the defendants below (who are the settlers of *New York*) must apply to a court of equity as well as the state herself ; but, in no case, can a specific performance be decreed, unless there is a substantial right of soil, not a mere political jurisdiction, to be protected and enforced. Besides, is not the bill, likewise, defective for want of making the defendants below parties to it ?[4]

Mr. Justice Chase said on this point :

The validity of the grant of either state must depend upon the question of boundary ; for neither *New York* nor *Connecticut*, could grant land, which it did not

[1] *State of New York* v. *State of Connecticut* (4 Dallas, 3, 4).
[2] *Ibid.* (4 Dallas, 3, 4 notes). [3] *Ibid.* (4 Dallas, 3, 4). [4] *Ibid.* (4 Dallas, 3, 4 note).

own. Hence, I think, the question of boundary must necessarily arise in the suits below.[1]

And Mr. Justice Patterson, in a short but weighty comment, stated both the facts of the case and the difficulties in them :

On the question just proposed by the Chief Justice, it may be remarked, that some difficulty would occur in sustaining a bill in this court, at the suit of the defendants below. But it does not appear to me, that any of the cases in the books apply to the present case. What does the bill present ? A case of disputed boundaries between two states ; and the question of soil, on their conflicting grants, must be decided by the question of jurisdiction. The State of *Connecticut* has granted out the *Gore* ; the State of *New-York* has, also, granted out the *Gore*. The grantees of *Connecticut* have brought suits in *Connecticut*, against the grantees of *New-York*, and will obtain possession of the land. If the grantees of *New-York* are thus evicted, they will bring suits in *New-York*, and, in their possession. But where will this feud and litigation end ? It is difficult and painful to conjecture, unless this Court can, under the constitution, lay hold of the case to decide the question of boundary, which will be a decision of all the appendages and consequences.[2]

Reply for the plaintiff.

After Ingersoll's argument, Lewis, for the plaintiff, was heard in reply, and it is so to the point that it is given in full, as is the judgement of the court, which, in the report, immediately follows it. Thus, Mr. Lewis said :

The difficulties of the case are obvious to all ; and, unless the present remedy is applied, the difficulties will dangerously increase. If the lands are not in *Connecticut*, the ejectments are *coram non iudice*. If they are not in *New-York*, suits there would be equally objectionable. Neither state will be satisfied, however, by the judgment of a Court held in the other ; and for want of a peaceful forum to decide the controversy, an odious and vindictive litigation may be perpetuated. But this Court has a constitutional jurisdiction on a question of boundary between states ; and, upon such an occasion, will be eager to exercise it. The interest of *New-York*, too, is sufficient to justify the exercise of it, upon her application. The right and possession of a sovereign state, are not to be treated like the usufructuary right, the *possessio pedis*, of a farmer. A sovereign state possesses what she governs. But is not *New-York* interested, even in a pecuniary point of view, so as to claim the interposition of this Court, to which her settlers, the defendants below, cannot originally resort ? It is a fundamental principle of the law of nature and of nations, that every government is bound to preserve peace and order, to protect individuals, to indemnify those who trust to its faith, and to prevent a dismemberment of its territory. This political and moral obligation, enforced by a regard to her public improvements, and fiscal operations, creates an interest of the highest character in the government of *New-York* ; and such as the Court will cherish with all its benevolence and authority.[3] 21 *Vin. Abr.* 181, *pl.* 1 ; *Ibid.* 183, *pl.* 4, 5, 7 ; *Ibid.* pl. 8, 11 ; 3 *Black. Com.* 255, 6.

The court recognized the difficulties of the case and the advantages of the determination of the boundaries in a suit between the States ; but as the relief asked was to have the parties in the lower court enjoined from continuing proceedings, not to have the Supreme Court determine the boundaries, which was within its original jurisdiction, the injunction was refused, the Court saying :

Injunction refused by the Court.

The COURT, after advisement, delivered their opinion, that as the State of *New-York* was not a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue.[4]

[1] *State of New York* v. *State of Connecticut* (4 Dallas, 3, 4 note).
[2] *Ibid.* (4 Dallas, 3, 4 note). [3] *Ibid.*(4 Dallas, 3, 5–6). [4] *Ibid.* (4 Dallas, 3, 6).

The reason, apparently, for this action, is thus stated by Mr. Justice Chase :

It is a mere bill to settle boundaries ; and we must take it as we find it, not as it might be made.[1]

It is to be observed that Chief Justice Ellsworth of Connecticut took no part in the decision ; indeed, he expressed the regret that he was obliged to be present, saying :

If there had been a quorum of judges, without my attendance, I should have declined sitting in this cause. As it is, I am glad that the opinion of my brethren, dispenses with the necessity of my taking a part in the decision.[2]

Decision based upon technical grounds.

The decision of the court in this phase of the case was technical, but based upon good and sufficient reason. The Circuit Court had jurisdiction of the cases of ejectment, inasmuch as they were suits at law between citizens of different states. As the court had held in the cases of *Fowler* v. *Lindsey* and *Fowler* v. *Miller*, the States of New York and Connecticut were not parties to the record, and were not affected by the judgement which would be entered in the cases below. Therefore, there was no reason to enjoin the prosecution of the suits. It may be observed, and it should be stated, that, in the first phase of *New York* v. *Connecticut*, the report specifically states that Mr. Ingersoll ' appeared for the individuals though not for the State '. He seems likewise to have appeared in the second phase for the individuals, but not for Connecticut. The State, therefore, had not appeared by counsel, and proceedings against it could not be begun, either without its presence or without the required evidence that the State had been properly notified and summoned, so as to give it an opportunity of litigating the case, should it so desire.

3. State of New York v. State of Connecticut.

(4 Dallas, 6) 1799.

Motion for leave to proceed *ex parte*.

Service of process.

Therefore, in the third phase of the case, Mr. Hoffman moved that Connecticut should appear on the first day of next term ' or that the plaintiff ', meaning thereby the State of New York, ' be then at liberty to proceed *ex parte* '. This motion was made in accordance with the rules made by the Supreme Court, and announced in the August term of 1797, prescribing that : first, in suit against a State process shall be served ' on the Governor or Chief Executive Magistrate, and Attorney General of such state '. The second, ' that process of *subpoena* issuing out of this court in any suit in equity shall be served on the Defendant sixty days before the return of the said process : And further, that if the Defendant, on such service of the *subpoena*, shall not appear at the return day contained therein, the Complainant shall be at liberty to proceed *ex parte* '.

The meaning of this was plain. The State of New York had filed its bill against the State of Connecticut ; notice was to be given and process served upon that State. As the State is an artificial person it cannot act of itself, and the court prescribed the rule, already announced and followed in the earlier suits brought by individuals against the States. But the service would fail of its purpose if the plaintiff were not

[1] *State of New York* v. *State of Connecticut* (4 Dallas, 3, 6 note).
[2] *Ibid.* (4 Dallas, 3, 6 note).

Question of default in appearance.

authorized to take further steps; because, as the individual defendant might fail to appear, so might the State. Should the proceedings be stayed because the State failed to appear, or until the State should be minded to pay attention to the process? This would be, in view of the constitutional grant of power to the Supreme Court and the consent of the States to be sued in that body, equivalent to a denial of justice. Therefore, treating the States in this respect as persons or as corporations, the plaintiff was invested with the right of presenting his case to the court *ex parte*, that is to say, without the presence of the defendant properly summoned. That there might be no doubt as to the regularity of the proceeding, and that a technical objection might not be made in the premises, Mr. Lewis, who also represented the State of New York, observed:

> the rule required that a *subpoena* issuing in a suit in equity, should be served sixty days before the return; which had not been done in the present case.[1]

To obviate this defect and to begin the case *de novo*, the first motion was thereupon waived; and an *alias subpoena* awarded, as in the case of *Grayson* against *Virginia* (3 Dallas, 320), decided in 1796. With this the case of *New York* v. *Connecticut* ends.

Experimental nature of the case.

The reader will not have failed to note the experimental way in which the case proceeded. Counsel did not foresee the steps to be taken and provide for them at the very beginning; the Court did not forecast them, or at least gave no intimation of having done so. The first step is taken, discussed, and debated, a second, and then a third; and the Court, considering each phase, expresses its opinion on the facts and circumstances as presented, without indulging in general comment or laying down general principles, which would have been the case had it been sure of itself, and if it had had the benefit of past experience by which to be guided. Throughout the meagre reports of the phases of this case, which have had to be connected by the arguments of counsel, a tender solicitude is observable on the part of the Court for the rights of the States and an unwillingness to make, by implication, the State a party, or to express an opinion as to the rights of the State if it were to be considered as a party. It is further to be observed that the Chief Justice, interested in and sworn to the administration of justice, nevertheless recognized that he was a citizen of Connecticut—in fact, he was its most distinguished citizen—and delicately and wisely abstained from taking a part in the decision of the case lest the impartiality of the proceedings might seem to be questioned because of his presence and participation.

4. State of New Jersey v. State of New York.

(3 Peters, 461) 1830.

A question of procedure.

On February 20, 1829, a bill was filed on the equity side of the Court by the State of New Jersey against the State of New York, and on March 16, 1829, a *subpoena* was awarded by the Court. On May 26, 1829, the writ was issued. It was served by the marshal upon the Attorney-General on June 5, 1829, and served by letter on the Acting Governor of the State, who acknowledged 'due service of the same' by an endorsement of the *subpoena*, signed by him on June 5. Inasmuch as

[1] *State of New York* v. *State of Connecticut* (4 Dallas, 6).

the *subpoena* was returnable on the first Monday in August, 1829, fifty-nine instead of sixty days thereafter, in accordance with the rule of court, an *alias* summons was issued, returnable in the January term of 1830. The summons was properly served upon the Acting Governor, but it was not served upon the Attorney-General, owing to his absence from the marshal's district. Counsel for New Jersey addressed a letter to the Governor and Attorney-General of New York, in which, after stating the service of the *subpoena*, they thus continued :

Notice is hereby respectfully given to you, that we, as solicitors for the state of New Jersey, complainant in the said bill, will move the said supreme court of the United States, on Saturday, the 13th of February next, to proceed *ex parte* in the said cause, and to take the said bill pro confesso, and rènder a decree in conformity with the prayer thereof, according to the rules of practice established in the said court, or for such other order as to the said court may seem meet ; unless, on or before the said 13th of February next, you shall have appeared and answered the said bill, or shall show sufficient cause to the contrary.[1]

On February 13, Mr. Wirt, a leader of the bar and Attorney-General of the United States during three administrations, appearing on behalf of New Jersey, informed the Court that there were two questions to be presented :

the first, whether there had been a sufficient service of the subpoena, supposing the court to have jurisdiction to issue it, without an act of congress ?

The second was, whether such jurisdiction existed ? [2]

Calling attention to the fact that, owing to the absence of the Attorney-General, the second *subpoena* was served only upon the Governor, he asked the Court if service upon both was necessary in order to make the service good, to which question Mr. Chief Justice Marshall replied :

that this was not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule was to be upon the governor and upon the attorney-general. A service on one was not sufficient to entitle the court to proceed against the state.[3]

The service upon either would have been sufficient had the rule of Court so determined, but the double requirement seems peculiarly appropriate, inasmuch as service upon the Governor and service upon the Attorney-General is in effect service upon the executive of the State and upon the officer charged with the administration of justice.

This settled the question of service. Mr. Wirt, however, was anxious to have the question of jurisdiction determined, and asked the Court to set a day for its argument before the *alias subpoena* was issued, as ' it might,' he said, ' if decided against the plaintiffs, prevent unnecessary expenses '. Mr. Wirt apparently was not clear in his mind that the Court would accept jurisdiction, and wished to save his client the trouble and expense of the proceeding if jurisdiction would not, in the end, be assumed. In order that the State of New York might have time to appear and employ counsel, if it so desired, he proposed a distant date, and he mentioned three weeks from the day of the application. Again Mr. Chief Justice Marshall replied, briefly and to the point, saying :

The court had no difficulty in assigning that day for the motion. It might be as well to give notice to the state of New York, as they might employ counsel in the

[1] *State of New Jersey* v. *State of New York* (3 Peters, 461, 463).
[2] *Ibid.* (3 Peters, 461, 464).
[3] *Ibid.* (3 Peters, 461, 464).

interim. If, indeed, the argument should be merely ex parte, the court would not feel bound by its decision ; if the state of New York afterwards desired to have the question again argued.[1]

Here again we see the solicitude of the Court for the rights, dignity, and prestige of the State summoned but not appearing, and the intent on the part of the Court to allow the proceedings to be opened up at any time should the defendant State be minded to appear and contest the case. March 6, 1830, was the day set for hearing the motion for the issue of a *subpoena* from the Supreme Court of the United States to the State of New York, and notice of the hearing was served upon the Governor and the Attorney-General of the State. No counsel, however, appeared for the State of New York, and on March 6, 1830, the counsel for New Jersey, appearing before the Court, stated that they were willing and prepared to argue the motion that the *subpoena* might issue. To this submission of counsel to the discretion of the Court, Chief Justice Marshall thus replied :

Subpoena granted by the Court *ex parte* without argument.

As no one appears to argue the motion on the part of the state of New York, and the precedent for granting the process has been established upon very grave and solemn argument, in the case of *Chisholm* v. *State of Georgia*, 2 Dall. 419, and *Grayson* v. *State of Virginia*, 3 Dall. 320, the court do not think it proper to require an ex parte argument in favour of their authority to grant the subpoena, but will follow the precedent heretofore established.'

The court are the more disposed to adopt this course, as the state of New York will still be at liberty to contest the proceeding at a future time in the course of the cause, if it shall choose to insist upon the objection.[2]

Solicitude of the Court for State rights.

The *subpoena* was therefore awarded upon motion of the plaintiff. Again, in this connexion, it is to be observed that the Court was careful to safeguard the rights of the State of New York, at the same time mindful of the rights of the plaintiff State, issuing at its behest a *subpoena* and authorizing it to proceed *ex parte*, should the State of New York refuse to appear in compliance with the process of the Court.[3]

5. Cherokee Nation v. State of Georgia.

(5 Peters, 1) 1831.

While only cases involving disputes concerning boundaries had been submitted to the Supreme Court for determination, and while it was considering the procedure to be followed by it in suits between States of the American Union, taking but a step

[1] *State of New Jersey* v. *State of New York* (3 Peters, 461, 464).

[2] *Ibid.* (3 Peters, 461, 466–7).

[3] The following is a copy of the *subpoena* awarded by the Court :

'The President of the United States, to the governor and the attorney-general of the state of New York, greeting :—For certain causes offered before the supreme court of the United States, holding jurisdiction in equity, you are hereby commanded and strictly enjoined, that, laying all matters aside, and notwithstanding any excuse, you personally be and appear, on behalf of the people of the said state of New York, before the said supreme court, holding jurisdiction in equity, on the first Monday in August next, at the city of Washington, in the district of Columbia, being the present seat of the national government of the United States, to answer concerning the things which shall then and there be objected to the said state, and to do further and receive on behalf of the said state, what the said supreme court, holding jurisdiction in equity, shall have considered in this behalf ; and this you may in no wise omit, under the penalty of five hundred dollars. Witness, the Honorable John Marshall, Esquire, Chief Justice of the said supreme court, at Washington city, the second Monday in January, being the 11th day of said month, in the year of our Lord 1830, and of the independence of the United States the fifth-fourth. William Thomas Carroll, Clerk of the Supreme Court of the United States.' (pp. 467–8.)

with each case, and before the nature and extent of its jurisdiction in such cases had been placed upon a firm and unassailable basis, a case arose between the Cherokee Nation, claiming to be a foreign, independent State, certainly not a State of the American Union, and the State of Georgia, admittedly one of the States forming that Union, in which the Supreme Court was asked not merely as a Court of the more perfect Union but as an international tribunal, to pass upon the controversy, admittedly international, and to decide it by due process of law.

Motion for an injunction to restrain breach of treaty rights by the State of Georgia.

On December 27, 1830, and January 1, 1831, notice and a copy of a bill filed at the instance and under the authority of the Cherokee Nation were served upon the Governor and the Attorney-General of the State of Georgia, the notice stating that a motion for an injunction would be made in the Supreme Court of the United States on the 5th day of March, 1831. The motion, as summarized and stated by the official report, was brought ' to restrain the State of Georgia, the governor, attorney-general, judges, justices of the peace, sheriffs, deputy-sheriffs, constables, and other the officers, agents and servants of that state, from executing and enforcing the laws of Georgia, or any of these laws, or serving process, or doing anything towards the execution or enforcement of those laws, within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation '.[1]

For the purposes of this case, it is only necessary to state that the various tribes constituting the Cherokee Nation occupied territory within the boundaries of the State of Georgia, that their right to the possession and occupation of these lands as distinct from ultimate ownership was recognized by treaties with the United States ; and that numerous treaties, by virtue of which, to quote the language of the bill, as summarized by the official report, ' the Cherokee nation of Indians are acknowledged and treated with as sovereign and independent states, within the boundary arranged by those treaties ; and that the complainants are, within the boundary established by the treaty of 1719, sovereign and independent ; with the right of self government, without any right of interference with the same on the part of any state of the United States.' [2] It is unnecessary to chronicle or to summarize the acts of Georgia by which it annexed the Indian territory to the counties of the State and extended its laws over that territory, as the mere statement of the fact asserts the claim to jurisdiction denied by the bill and to prevent which the suit was brought.

Injunction refused by the Court.

The Indians were unfortunate, in that the Court refused to take jurisdiction of the case as made out by the bill ; but they were fortunate in having their case carefully, sympathetically, and thoroughly considered by Mr. Chief Justice Marshall, who delivered the judgement of the Court, and who, in the very opening words of his opinion, stated the case as he and his brethren conceived it, and, in his own behalf, the feelings with which he approached it :

Judgement of Chief Justice Marshall.

This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokee, as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States, in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people, once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 2). [2] *Ibid.* (5 Peters, 1, 5).

of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands, by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.[1]

The question, however, was not one of sympathy, it was one of jurisdiction of a Court limited by the States creating it to specified parties, specified subject-matter; for the parties, if not States of the American Union or the United States itself, could only be foreign States, and the subject-matter could only be disputes to which the judicial power could properly be extended. But why discuss all these things in the presence of the master, instead of allowing Chief Justice Marshall himself to express his views, which were on this occasion the opinion of the majority if not of a unanimous Court?

Question of jurisdiction.

Before we can look into the merits of the case [he said], a preliminary inquiry presents itself. Has this court jurisdiction of the cause?

The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with 'controversies' 'between a state or citizens thereof, and foreign states, citizens or subjects'. A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state, in the sense in which that term is used in the constitution?[2]

This question divided itself into two parts and was examined by the Chief Justice in each of its aspects; or, admitting that the Cherokee Indians constituted a political community, it did not necessarily follow that that community, admitting it to be a State, was foreign in the sense of the Constitution. Before entering into a detailed examination of the nature of the Cherokee nation, he thus stated generally the twofold question:

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Are the Cherokees a 'foreign state'?

A question of much more difficulty remains. Do the Cherokees constitute a *foreign* state in the sense of the constitution?

The counsel have shown conclusively that they are not a state of the Union, and have insisted that individually, they are aliens, now owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.[3]

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 15).
[2] *Ibid.* (5 Peters, 1, 15–16).
[3] *Ibid.* (5 Peters, 1, 16).

This argument was, as the Chief Justice said, imposing, but there were insuperable objections to it. It was true, as he remarked, that nations are foreign which do not owe a common allegiance, but that the relations of the Indians to the United States are peculiar and marked by distinctions which do not exist elsewhere. The Indian territory admittedly forms a part of the United States. Its people are subject to our jurisdiction, at least in its relations with foreign countries ; they admit themselves in fact and by treaty to be subject to American protection, and by the Constitution the Congress is specifically authorized to regulate commerce with them. This phase of the subject and the conclusions to be drawn from it are :

The Indian tribes are wards of the United States.

Though the Indians are acknowledged to have an unquestionable, and, heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government ; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection ; rely upon its kindness and its power ; appeal to it for relief to their wants ; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a state or the citizens thereof and foreign states.[1]

In considering somewhat in detail the power of Congress ' to regulate commerce with foreign nations, and among the several States, and with the Indian tribes ', the Chief Justice comes to the conclusion that the framers of the Constitution carefully chose three categories granting to the General Government a power which it might have had in one case but not necessarily in the three unless expressly enumerated. And he pointed out that, if the framers of the Constitution had wished to regard the Indian tribes as foreign nations, and yet at the same time to invest Congress with the power to regulate commerce, they might have done so had they authorized the legislature ' to regulate commerce with foreign nations, including Indian tribes, and among the several States '.[2]

To the contention of counsel that the meaning of a term depends upon its context, and that the phrase ' foreign state ' was without qualification in the clause of the Constitution relating to the judicial power, the Chief Justice replied, admitting the contention generally, that the use of the term ' Indian tribes ' in connexion with the expression ' foreign nations ' meant that, although they might be States or nations, they were not foreign, and that the relation of the tribes to the United States and to foreign nations having been determined in one clause of the Constitution, it was not to be supposed that, where the term ' foreign state ' was used in another and

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 16–17). [2] *Ibid.* (5 Peters, 1, 19).

a different passage of the Constitution, it was to be understood to include Indian tribes which had apparently been excluded from that signification in another clause. And, to reinforce this, a quotation may be made from a previous portion of his opinion, *in pari materia* :

> In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbours, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.[1]

For these reasons a majority of the Court came to the conclusion that an Indian tribe or nation within the United States was not a foreign State, at least in the sense of the Constitution, and that it could not sue in a capacity only granted to a foreign State.

In this disposition of the case it will be observed that the merits of the question have not been considered, inasmuch as the rights of the Indians as a political community to maintain their action depended upon the fact that they were a foreign State in the sense of the Constitution and the judicial clause. Indeed, the merits of the question were necessarily excluded. Yet by way of reinforcing the conclusion, which might be open to doubt, and was doubted by that acknowledged master of international law, Mr. Justice Story, who concurred in the dissenting opinion of Mr. Justice Thompson, holding the Indian nation to be a foreign State in the Constitutional sense, the Court either found it necessary or thought it advisable to look at the facts of the case, in order to see whether they made out a case which a foreign State could submit to the Court and of which the Court should take cognizance.

The dispute is political, not judicial.

The subject-matter seemed to the majority to be political, not judicial, and therefore the resort should be to the Government and not to its courts. The dissenting opinion admitted that a large part of the relief sought was political, not judicial, but Mr. Justice Thompson, with whom Mr. Justice Story concurred, was firmly of the opinion that the Court should not decline jurisdiction because of its inability to grant relief, inasmuch as part of the prayer of the bill was addressed to the judicial discretion of the Court. Admitting the question of title was judicial, not political, but that it was so involved in the bill, and depended to such a degree upon a remedy, in this case political, as to be unenforceable, Mr. Chief Justice Marshall thus concluded the opinion in behalf of the Court, which remains on this point as unquestioned to-day as when first delivered :

> A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision ? It seeks to restrain a state from the forcible exercise of legislative power over a neighbouring people, asserting their independence ; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation, this court cannot interpose ; at least, in the form in which those matters are presented.

The Court could decide questions of title, if properly presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 18).

question of right might perhaps be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned ; it savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.[1]

The motion for the injunction was therefore denied.

Divergent views of the judges.

It has been stated that the opinion in this case was not unanimous, although to-day there is no dissent from the opinion of Mr. Chief Justice Marshall. There were then a Chief Justice and seven Associate Justices of the Supreme Court, and the extent to which Mr. Chief Justice Marshall's opinion was to be regarded as the opinion of the Court will be best shown by the fact that the Chief Justice himself and five of the Justices were of the opinion that the Cherokee nation constituted a State ; two, Messrs. Johnson and Baldwin, delivered opinions concurring in form but dissenting in fact from this holding ; the Chief Justice and five Justices opposed the view that the Cherokee nation could be considered a foreign nation, including Messrs. Johnson and Baldwin, who necessarily denied that it was a foreign State, inasmuch as they denied that it could properly be considered a State ; the Chief Justice and four of the Justices, including Mr. Justice Johnson, with much misgiving, held that the Cherokee nation constituted a domestic State ; Justices Story and Thompson, that they constituted a foreign State ; Mr. Chief Justice Marshall and five Justices that the relief demanded was political, if the Cherokee nation were entitled to sue as a State ; but even Justices Story and Thompson considered that, in part, the relief demanded was political. They were unanimous on one point, that as a court of limited jurisdiction the Court was required in every case to consider the question of jurisdiction, and to decide it affirmatively before entertaining the case.

It may also be said that there seems to have been no doubt in the mind of the Judges that the Court would have entertained jurisdiction if the Cherokee nation had been in law and in fact a foreign State, in accordance with the language of the judiciary article of the Constitution, which extends the judicial power ' to Controversies . . . between a State, or the citizens thereof, and foreign States, citizens, or subjects '. Indeed, had they not have been of that opinion, the Chief Justice and the Associate Justices would not have taken pains to establish the fact that the Cherokee nation was not a foreign but a domestic State. They would have contented themselves either with the statement that a foreign State could not sue, which would seem to be in the teeth of the Constitution, or that it means only that a State of the Union should be the plaintiff, and that a foreign State could only be a defendant, as the Supreme Court has decided that the United States can sue but cannot be sued without its express consent in the Supreme Court. The case, however, of a foreign State appears never to have arisen, although in 1917 the Republic of Cuba put in

No case of suit by a foreign State has yet been decided.

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 20).

suit bonds of North Carolina, and began action against that State in the Supreme Court of the States for the principal and interest due on bonds, similar to those which had been put in suit in the case of *South Dakota* v. *North Carolina* (192 U.S. 286), decided in 1904, and which had apparently been given to the Cuban Republic for the purposes of suit, as bonds of North Carolina had been given to the State of South Dakota for that purpose. The case, however, did not come to a hearing, as the Republic of Cuba itself moved to dismiss the motion for leave to bring suit the day set for its hearing.

Dissenting opinion of Justices Thompson and Story.

Unfortunately, it is impossible, because of its length, to do justice to the opinion of Mr. Justice Thompson, in which Mr. Justice Story concurred, and it is difficult to summarize it because it is a classic argument. It would, however, be unjust not to quote a few passages from it, if for no other reason than to show how the divergent views on this subject were before the Court and debated and considered by the Justices.

The first passage to be quoted enumerates the essentials of a State or Nation stated in terms of Vattel, then and now a good and safe authority, although we do not speak of the state of nature or use it in the sense in which Vattel stated and used it. But although natural law may have had its day, the conclusions drawn from it the world would not readily let go. However, to return to Mr. Justice Thompson, who says, speaking for himself and for Mr. Justice Story, whose authority is only less than that of his great chief :

That a state of this Union may be sued by a foreign state, when a proper case exists and is presented, is too plainly and expressly declared in the constitution, to admit of doubt ; and the first inquiry is, whether the Cherokee nation is a foreign state, within the sense and meaning of the constitution.

Definition of 'state' and 'nation'.

The terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing ; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage ; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states ; are to be considered as so many free persons, living together in a state of nature. Vattel, 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent : that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied ; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account, to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state. Vattel, c. 1, pp. 16, 17.[1]

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 52–3).

Having thus laid down the essentials of statehood, the learned Justice, still speaking for himself and Mr. Justice Story, proceeded, assigning to the Cherokee Indians the rank and position of a foreign State :

Definition applied to the Cherokees.

Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state. They have always been dealt with as such by the government of the United States ; both before and since the adoption of the present constitution. They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same ; yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self government over what remained unsold. And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people. And indeed, I do not understand it is denied by a majority of the court, that the Cherokee Indians form a sovereign state, according to the doctrine of the law of nations ; but that, although a sovereign state, they are not considered a foreign state, within the meaning of the constitution.[1]

After invoking history in order to show that, at the time of the discovery of America, the Indians were sovereign peoples, and possessed as of right the land occupied by them, the learned Justice continues :

The circumstance of their original occupancy is here referred to, merely for the purpose of showing, that if these Indian communities were then, as they certainly were, nations, they must have been foreign nations, to all the world ; not having any connection, or alliance of any description, with any other power on earth. And if the Cherokees were then a foreign nation ; when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community ?[2]

And, answering the question thus put, he says :

They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. Whenever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances ; the Indian nation always preserving its distinct and separate national character.[3]

And, speaking of the matter of occupancy, he says:

But the principle is universally admitted, that this occupancy belongs to them as a matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent ; or unless a just and necessary war should sanction their dispossession.[4]

And thereupon Mr. Justice Thompson announces his own opinion and that of Mr. Justice Story on this point that

In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil.[5]

The word 'foreign'

The learned Justice next embarks upon an accurate, detailed, and yet interesting analysis of the sense in which 'foreign' is used, holding that 'it is the political relation in which one government or country stands to another, which constitutes

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters 1, 53–4).
[2] *Ibid.* (5 Peters, 1, 54).
[3] *Ibid.* (5 Peters 1, 54–5).
[4] *Ibid.* (5 Peters, 1, 55).
[5] *Ibid.* (5 Peters, 1, 55).

it foreign to the other '.[1] And in the course of this discussion, appealing to lexicographers, he says, ' in a general sense, it is applied to any person or thing belonging to another nation or country. We call an alien a foreigner, because he is not of the country in which we reside. In a political sense, we call every country foreign, which is not within the jurisdiction of the same government. In this sense, Scotland, before the Union, was foreign to England ; and Canada and Mexico, foreign to the United States. In the United States, all transatlantic countries are foreign to us '.[2] But the term ' foreign ', he says, is not confined to distant, it may be applied to neighbouring countries ; and is, as a matter of fact, applied in law to States of the American Union. ' And it may be laid down,' he says, ' as a general rule, that when used in relation to countries in a political sense, it refers to the jurisdiction or government of the country '.[3] He next refers to the commercial usages of the term, saying, ' In a commercial sense we call all goods coming from any country not within our own jurisdiction foreign goods. In the diplomatic use of the term, we call every minister a foreign minister, who comes from another jurisdiction or government '.[4] The principles which he has thus laid down, or rather, which he finds everywhere existing, he applies not merely to neighbouring nations, but to the political communities forming the more perfect Union under the Constitution of the United States. Thus : ' This is the sense in which it is judicially used by this court, even as between the different states of this Union '.

Precedents examined.

Mr. Justice Thompson here refers to the case of *Buckner* v. *Finlay* (2 Peters, 586, 590, 591), decided in 1829, in which Mr. Justice Washington, after referring to the distinction between foreign and inland bills of exchange, and speaking for a unanimous Court, said :

> Applying this definition to the political character of the several states of this union in relation to each other, we are all clearly of opinion, that bills drawn in one of these states, upon persons living in any other of them, partake of the character of foreign bills, and ought so to be treated. For all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed, with great force, by the president of the court of appeals of Virginia, in the case of *Warder* v. *Arrell*, 2 Wash. 298 ; where he states, that in cases of contracts, the laws of a foreign country where the contract was made, must govern ; and then adds as follows—' The same principle applies, though with no greater force, to the different states of America ; for though they form a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign.'

Upon this case, to whose authority he had appealed, Mr. Justice Thompson says, on behalf of himself and Mr. Justice Story :

> It is manifest from these cases, that a foreign state, judicially considered, consists in its being under a different jurisdiction or government, without any reference to its territorial position. This is the marked distinction, particularly in the case of *Buckner* v. *Finlay*. So far as these states are subject to the laws of the Union,

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 55).
[2] *Ibid.* (5 Peters, 1, 56).
[3] *Ibid.* (5 Peters, 1, 56).
[4] *Ibid.* (5 Peters, 1, 56).

they are not foreign to each other. But so far as they are subject to their own respective state laws and government, they are foreign to each other. And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or not ; I am unable to perceive any sound and substantial reason why the Cherokee nation should not be so considered. It is governed by its own laws, usages and customs ; it has no connexion with any other government or jurisdiction, except by way of treaties entered into with like form and ceremony as with other foreign nations.[1]

Coming to the question, and holding that the Cherokee Nation is a foreign State within the meaning of the Constitution, Mr. Justice Thompson and his illustrious colleague take up an aspect of the case which must needs be decided one of these days, and which would have been decided if the Republic of Cuba had not thought it wise, under all the circumstances of the case, to dismiss its suit against the State of North Carolina. On this point Mr. Justice Thompson says :

Although there are many cases in which one of these United States has been sued by another, I am not aware of any instance in which one of the United States has been sued by a foreign state. But no doubt can be entertained that such an action might be sustained upon a proper case being presented. It is expressly provided for in the constitution ; and this provision is certainly not to be rejected as entirely nugatory.

Suppose a state, with the consent of congress, should enter into an agreement with a foreign power (as might undoubtedly be done, Constitution, Art. 1, § 10), for a loan of money ; would not an action be sustained in this court to enforce payment thereof ? Or suppose the state of Georgia with the consent of Congress, should purchase the right of the Cherokee Indians to this territory, and enter into a contract for the payment of the purchase money ; could there be a doubt that an action could be sustained upon such a contract ? No objection would certainly be made for want of competency in that nation to make a valid contract. The numerous treaties entered into with the nation would be a conclusive answer to any such objection. And if an action could be sustained in such case, it must be under that provision in the constitution which gives jurisdiction to this court in controversies between a state and a foreign state. For the Cherokee nation is certainly not one of the United States.[2]

And in the next passage, the last which may be quoted, Mr. Justice Thompson, with the concurrence of Mr. Justice Story, lays down, as regards treaties and as regards the suability of the United States, what may be considered the general rule :

Jurisdiction under the Constitution in treaty cases.

And what possible objection can lie to the right of the complainants to sustain an action ? The treaties made with this nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory. And if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny to them the right and the power to enforce such a contract. And where the right secured by such a treaty forms a proper subject for judicial cognizance, I can perceive no reason why this court has not jurisdiction of the case. The constitution expressly gives to the court jurisdiction, in all cases of law and equity arising under treaties made with the United States. No suit will lie against the United States upon such treaty, because no possible case can exist, where the United States can be sued. But not so with respect to a state : and if any right secured by treaty has been violated by a state, in a case proper for judicial inquiry, no good reason is perceived, why an action

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 57). [2] *Ibid.* (5 Peters, 1, 58).

may not be sustained for violation of a right secured by treaty, as well as by contract under any other form. The judiciary is certainly not the department of the government authorized to enforce all rights that may be recognised and secured by treaty. In many instances, these are mere political rights with which the judiciary cannot deal. But when the question relates to a mere right of property, and a proper case can be made between competent parties; it forms a proper subject for judicial inquiry.[1]

It will be observed, in the course of this narrative, particularly from his dissenting opinion in the case of *Florida* v. *Georgia* (17 Howard, 478, 496), decided in 1854, that Mr. Justice Curtis was inclined to interpret very strictly the grant of judicial power in so far as it affected the States, and that, in the opinion to which reference is made, he denied to the United States the right to intervene in the case, and indeed the right to sue a State of the American Union in the Supreme Court of the United States. Yet both before becoming a Justice of the Supreme Court in 1851, and after his resignation from that tribunal in 1857, during which period he very greatly distinguished himself, he was of opinion that a foreign State could sue a State of the American Union in the Supreme Court.

Comments of Mr. B. R. Curtis, 1844.

In a very carefully prepared essay—it could properly be called a monograph—on the debts of the States, published in the *North American Review* for January 1844, Mr. Benjamin R. Curtis, then at the bar, thus stated the suability of a State of the American Union at the instance of a foreign State:

> The Constitution, as originally adopted, contained, in Art. III: Sect. 2, the following words: 'The judicial power shall extend to controversies between a State, or the citizens thereof, and foreign States, citizens, or subjects.' The eleventh article of the amendments declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State'. Thus the original provision as to suits against one of the United States by foreign States was allowed to stand. Mr. Chief Justice Marshall [*Jay*], in his very able opinion in the case of *Chisholm* v. *The State of Georgia*, has stated the reason of this provision in such a manner as renders it quite applicable to our present purpose. He says the Constitution contained this provision: 'because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people, ought to be ascertained by, and depend on national authority.' There can be no doubt, therefore, that by the very terms of the Constitution a foreign State or sovereign may sue one of the United States in some court of the United States. Nor has the Constitution left it doubtful, or even left it for Congress to provide, which court it shall be; for it contains the following words: 'In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.[2]

In the passage immediately succeeding, Mr. Curtis declares it, as incidental to sovereignty, that a State may appear in behalf of its subject or citizen, and that therefore a foreign State may sue a State of the American Union:

> We conceive also that a foreign State or sovereign may easily be placed in such a condition as to prosecute these claims. It is incident to the sovereign power that it should be able to make itself the owner of such claims. The rules as to the purchase and sale of rights of action which affect individuals are not applicable to the sovereign. The law presumes that the government of a country will not be guilty of champerty

[1] *Cherokee Nation* v. *State of Georgia* (5 Peters, 1, 58, 59).

[2] George Ticknor Curtis, *The Life and Writings of B. R. Curtis* (1880), vol. ii, pp. 145–6.

or maintenance. Under the common law, the king might take an assignment of a debt, and sue therefor in his own name. And we have no doubt that the same law exists in all countries. It seems to follow, then, that if the sovereign should take an assignment of a claim, and sue therefor in the court of a foreign country, the comity and respect due to the foreign sovereign would necessarily prevent the court from inquiring into the causes and motives of the assignment; especially in a country where the common law exists, which makes all debts negotiable between the sovereign and a subject or citizen. And if this motive were inquired into, it would appear that the foreign sovereign had taken the assignment merely to discharge a duty to his subjects by affording to them a remedy for a supposed wrong.[1]

The propriety of such action, the rôle which an international court can properly assume, and the services which it can render are thus stated by this distinguished jurist:

Certainly it would not be a subject of complaint or regret on our part that this course should be taken, and that the foreign sovereign should submit the question to the decision of our own highest tribunal, instead of resorting directly to negotiation. In the event of such a thing becoming necessary, we should look upon an application to the Supreme Court of the United States as not only practicable but desirable, and we should feel thankful for the existence of that principle in the public law, and that wise provision in our own Constitution, which enable us to ask foreigners to seek for justice in that high tribunal which was created to establish it,—a tribunal known to the world as elevated far above all State biases and prejudices, whose members come together from the North and the South, from the East and the West, across distances wider than half of Europe, and listen to sovereign States as they contest their claims to territory and jurisdiction; a tribunal which sits in judgment on the acts of the legislature of the nation, and decrees them to be valid or void; a tribunal which is our own ark of safety, and to which offended Europe may come confidently and obtain such justice as war and reprisals never gave and never can give.[2]

Opinion of Mr. Curtis advising Great Britain, 1860.

In 1860 Mr. Benjamin R. Curtis, then again at the bar after an experience of six years upon the supreme bench of the States, was called upon in the practice of his profession to advise a client, none other than Great Britain, whether it could, as a foreign State in behalf of the Cayuga Indians, residing in Canada, implead the State of New York in the Supreme Court of the United States in order to secure from that State the payment of an annuity, to which Great Britain believed that its Indian dependants were entitled. Mr. Curtis, in the first part of his opinion, considered the case of *Cherokee Nation* v. *Georgia* (5 Peters, 1), giving his assent to the doctrine of the Court, and so advising his client. After having decided that the Cayuga Indians could not maintain a suit in their own name because of this case, he asks, 'whether a suit may not be brought in the Supreme Court of the United States in the name of her Majesty the Queen of Great Britain, &c., in behalf of the Cayugas, to enforce their claim.' And he thus answers the question, acting under a sense of professional responsibility:

Upon a question some of the elements of which are of novel impression, it would not become me to express a confident opinion. But after an attentive consideration I think such a suit may be maintained.

The right to receive an annual payment, in consideration for a transfer of their lands, belongs to a tribe or nation of Indians, who occupy a portion of her Majesty's territory, and who, while they are, for some purposes, a separate political community,

[1] George Ticknor Curtis, *The Life and Writings of B. R. Curtis*, vol. ii, pp. 146–7.
[2] *Ibid.*, p. 147.

are also in a state of pupilage, resembling the relation of a ward to a guardian. Their rights and claims are under the care and protection of the Crown, upon principles, and by reason of causes, which have been long in operation in the United States, and which must be felt and acknowledged here. And if the sovereign should think fit to act as their trustee, in enforcing a claim of this nature in a court of justice, I believe the right to do so would be acknowledged.

In case such a course should be deemed suitable and proper, it would be important for the Cayugas, acting through their recognized and competent authorities, to prefer a petition to the Crown to take cognizance of their claims, and act in their behalf in reference thereto ; and to this end, that a formal transfer should be made to the Crown of the agreements between the State of New York and the Cayuga nation upon which the present claims depend.[1]

And twelve years later, Mr. Curtis thus forcibly and pointedly restated his views in a course of lectures delivered in the Harvard Law School on the jurisdiction of the United States Courts :

Therefore, this eleventh amendment withdraws the States from any liability to a suit by an individual, whether a citizen of another State or a citizen of a foreign State, but it leaves the State to be sued by another State, and it leaves the State also to be sued by a foreign sovereign. A foreign citizen or subject cannot sue a State ; but a foreign sovereign, as, for instance, the Queen of England, may bring a suit against the State of Massachusetts, or any other State in the Union, in the Supreme Court of the United States.[2]

6. State of New Jersey v. State of New York.

(5 Peters, 284) 1831.

Service of the *subpoena* and non-appearance of New York. Motion of New Jersey.

The *subpoena* in the first phase of the case of *New Jersey* v. *New York* was regularly served, and, at the expiration of two months, Mr. Wirt, on behalf of New Jersey, appeared before the Supreme Court, set forth the facts of service and non-appearance, and proposed at the end of his argument in support of his motion that ' the court direct a rule to be entered that the bill be taken *pro confesso*, unless the party against whom it is filed appear and answer before the rule day in August next ; and if they do not, that the cause be set down for a final hearing at the next term of this court, on such proofs as the complainants may exhibit.' [3]

In support of his motion, Mr. Wirt called attention to the seventeenth section of the Judiciary Act of 1789, authorizing the Court to make and establish all necessary rules for the conduct of its business, although the Court had, in his opinion, such power without the aid of that provision of the law. Mr. Wirt cited, as applicable to the matter in hand, the seventh rule of the Supreme Court, made in the August term, 1791, the text of which is as follows :

The Chief Justice, in answer to the motion of the attorney-general, informs him and the bar, that this court consider the practice of the court of king's bench and of chancery, in England, as affording outlines for the practice of this court ; and that they will, from time to time, make such alterations therein as circumstances may render necessary.[4]

[1] George Ticknor Curtis, *The Life and Writings of B. R. Curtis*, vol. i, pp. 283–4.
[2] Curtis, *Jurisdiction of the United States Courts*, 2nd ed., pp. 16–17.
[3] *State of New Jersey* v. *State of New York* (5 Peters, 284, 286).
[4] *Ibid.* (5 Peters, 284, 284–5).

He also called attention to the rule of the court previously quoted, made in 1796, by virtue of which the complainant was at liberty to proceed *ex parte* if after service and the expiration of the return date the defendant had not appeared.

English practice considered.

The learned counsel, therefore, maintained that according to the practice in chancery and the rule of the court permitting the complainant to proceed *ex parte*, the State of New Jersey could properly proceed to a hearing. He was apparently worried by the thought of compelling the appearance of a State, as English practice in such cases would not be proper in the case of a defendant State. He found consolation in the fact that the bill was to quiet title and was therefore a bill of peace, and that the rule permitting the complainant to proceed *ex parte* considered the defendant, when served with process, in the same position as if it had appeared. The difficulty which next confronted him was the step to be taken when all process to compel an appearance was exhausted, and, after consideration of English practice, which permitted the complainant to take the bill *pro confesso*, when the process to compel appearance was exhausted, and after stating that his client, the State of New Jersey, stood in this position, he expressed the need of a further step, but referred it to the consideration of the court, saying :

> Something is now to be done in this case ; and it is for the court to determine, what that may be. If the court desire it, it is fully competent to them to make any new rule relative to the future proceedings in the case.[1]

While recognizing it to be the prerogative of the court to determine this matter, he felt it his duty to place his services at the disposal of the tribunal and to aid it by way of suggestion. Thus, he said :

> In the court of chancery in England, the party could take a decree, pro confesso, and consider it as final. But this is not the wish of the complainant. It is desired that the proceedings should be carried on with the utmost respect to the other party ; and the wish of the state of New Jersey is to have an examination of the case, and a final decree, after such an examination.[2]

Decision of the Court permitting New Jersey to proceed *ex parte*.

On this state of the facts, the case was submitted to the court, which rendered its opinion per Marshall, Chief Justice. After quoting the provision of the Constitution, extending the judicial power to controversies between two or more States, and that the Supreme Court shall have jurisdiction of those in which a State shall be a party, and after stating that ' Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution ', the Chief Justice took up and examined the decisions of the Court in so far as they might be considered precedents or as throwing light upon the procedure to be followed.

After citing the suits against States, all of which, before the case of *New York* v. *Connecticut* (4 Dallas, 1–6), were suits brought by individuals of the States against States of the Union, a right withdrawn by the 11th Amendment, he thus stated the rule of practice derived from those cases and to be followed in the one at hand :

> It has, then, been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority

[1] *State of New Jersey* v. *State of New York* (5 Peters, 284, 286).
[2] *Ibid.* (5 Peters, 284, 286).

conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court on the failure of the state to appear, after the due service of process, has been also prescribed. In this case, the subpoena has been served as is required by the rule. The complainant according to the practice of the court, and according to the general order made in the case of *Grayson* v. *Commonwealth of Virginia*, has a right to proceed ex parte; and the court will make an order to that effect, that the cause may be prepared for a final hearing.[1]

Applying the procedure thus outlined to the case of *New Jersey* v. *New York*, the Chief Justice said:

If upon being served with a copy of such order, the defendant shall still fail to appear or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof.[2]

The Chief Justice, however, was unwilling to go beyond the precedents, and, recognizing as did Mr. Wirt the difference between an individual on the one hand and the State on the other, he was unwilling to follow the procedure in chancery, which, on default of the defendant, would take the bill *pro confesso*, and enter a decree in accordance with the prayer of the bill. He was likewise unwilling to state in advance of the case the procedure to be followed after the hearing, and, that there should be no doubt upon the subject, he gave the reason:

But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a state; the question of proceeding to a final decree will be considered as not conclusively settled, until the cause shall come on to be heard in chief.[3]

The Chief Justice, however, expressed the determination of the Court to execute the power vested in it in suits between States, as appears from the following order entered in this phase of the case:

The subpoena in this cause having been returned executed sixty days before the return day thereof, and the defendant having failed to appear, it is, on motion of the complainant, decreed and ordered, that the complainant be at liberty to proceed ex parte; and it is further decreed and ordered, that unless the defendant, being served with a copy of this decree sixty days before the ensuing August term of this court, shall appear on the second day of the next January term thereof, and answer the bill of the complainant, this court will proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill.[4]

7. State of New Jersey v. State of New York.

(6 Peters, 323) 1832.

Third phase. Discussion of what constitutes 'appearance'.

The case of *New Jersey* v. *New York* entered upon its third and final phase in so far as the Supreme Court is concerned. Technically, New York did not appear, that is to say, the Attorney-General of the State did not appear, nor did counsel appear on behalf of the State, authorized to represent it in the sense in which counsel represented New Jersey. A demurrer was presented on behalf of the Attorney-General of New York, and Mr. Beardsley, attorney and counsellor of that State,

[1] *State of New Jersey* v. *State of New York* (5 Peters, 284, 290–1).
[2] *Ibid.* (5 Peters, 284, 291). [3] *Ibid.* (5 Peters, 284, 291). [4] *Ibid.* (5 Peters, 284, 291).

appeared before the Court, stating that he had been authorized to file and serve the demurrer by the Attorney-General. He further stated that he was not counsel in the case, and that there was no counsel in the city to represent the State. The next statement doubtless was heard with great interest by counsel for New Jersey and the members of the Court, as it intimated the intention of New York to comply, however tardily, however ungraciously, however unwillingly, with the *subpoena*. Thus, Mr. Beardsley said :

The Attorney-General was not expected, until the argument of the demurrer should come on.[1]

He asked the permission of the Court to make a few suggestions, inasmuch as he had filed the demurrer as agent for the Attorney-General. For the present purpose, it is not necessary to follow Mr. Beardsley's observations, inasmuch as he spoke in an unofficial capacity, other than to say that the Attorney-General of New York considered the demurrer as an appearance in the cause, although it contained a suggestion that the Court has no jurisdiction, that the entry of an appearance was a mere form ; that filing of the demurrer was ample authority for making such entry, if at all necessary ; that in England the filing of a demurrer is considered an appearance in the cause ; that although ordered to answer a demurrer admits all the facts well stated in the bill, and it is therefore to be considered as strictly and literally within the order.

Appearance considered sufficient by the Court.

Again, Mr. Chief Justice Marshall delivered the opinion of the court as to the only question before it at this time, whether the demurrer filed with the clerk of the court was to be considered as an appearance and as an answer, in compliance with the order issued in the second phase of the case. The Chief Justice stated that the court so considered it ; that, if on the contrary, the Attorney-General of New York did not mean it to be such, then it would not be regarded as an appearance or as a compliance with the order, and that this statement was made in order that the Attorney-General might have due notice to withdraw the demurrer, if it were not to be considered as an appearance and an answer in the case. The Chief Justice recognized, however, that the appearance of New York was not such as the court had contemplated or as the counsel for New Jersey might have had reason to expect, and that, if the strict procedure obtaining between individuals was requisite in suits between States, the State of New York would be held to have failed to comply with the order. The court, however, recognized the distinction between an individual and a State, and that the latter has a temper of its own. Therefore, the court said :

The word ' answer ' is not used in a technical sense, as an answer to the charges in the bill under oath ; but an answer, in a more general sense, to the bill. A demurrer is an answer, in law, to the bill, though not in a technical sense, an answer according to the common language of practice.[2]

Case settled out of Court.

Accepting the demurrer as amounting to a compliance, the court therefore directed the demurrer to be set down for argument, in accordance with the motion of the plaintiffs. This ended the third phase of the case, and, in fact, it ended the case, because it did not appear again in court, but was settled out of court by mutual agreement of the States.

[1] *State of New Jersey* v. *State of New York* (5 Peters, 323). [2] *Ibid.* (5 Peters, 323, 327).

Cautious development of the procedure in inter-State cases.

The proceedings in the three phases of the case of *New Jersey* v. *New York* have been described in detail, in order to show how slowly, how cautiously, counsel and court approached the question of suits between the States; how clearly they recognized the distinction between private suitors, on the one hand, and States of the Union, on the other, which had consented to be sued in the Supreme Court, but were apparently unwilling to be dragged before it; how patiently they considered the difficulties which arose in attempting to secure an appearance of the States; how prudently they circumvented the obstacle standing in the way of an appearance by accepting an informal and doubtful expression of intent to appear as an appearance and a compliance with an order of the court, in order that a procedure might be devised acceptable to the States and capable of administering justice between them, without compulsion and without creating ill-will, which might, in the case of suits between States, have resulted in a further amendment to the Constitution withdrawing the jurisdiction of the Supreme Court in such cases, as happened in the case of suits by individuals against the States.

8. State of Rhode Island v. State of Massachusetts.

(7 Peters, 651) 1833.

In 1833, Mr. Robbins, then United States Senator from Rhode Island, and solicitor for that State in its boundary suit against Massachusetts, made a motion in the January term, renewing his motion of the previous term, and, in the language of the record, praying the court to award such process and in such form as the court may deem proper. In pursuance of this motion and upon consideration of it, the court ordered, to quote from the official report its entire opinion in this case, that 'process of subpoena be, and the same is hereby awarded, as prayed for by the complainant, and that said process issue against "The Commonwealth of Massachusetts"'.

Subpoena granted by the Court.

The report of proceedings in this first phase of this famous case took up less than a dozen lines of the official report, and yet the result of their action was to bring to the bar of justice a sovereign State of the American Union.

9. State of Rhode Island v. State of Massachusetts.

(11 Peters, 226), 1837.

Application of Rhode Island for a postponement owing to the illness of counsel.

The second phase of the case began in 1837, after four years had elapsed, by the Attorney-General of the State of Rhode Island appearing in the Supreme Court and moving for a continuance, that is to say, a postponement of the case. The reason alleged was that Mr. Hazard, a distinguished lawyer of Rhode Island, associated as senior counsel with the Attorney-General in this cause, was unable to appear because of illness. The Attorney-General apparently felt that something more than a mere request was needed to justify the continuance, for he knew that the Attorney-General of Massachusetts was present to oppose it. Therefore, after stating the necessity of Mr. Hazard's appearance, which was impossible without a postponement, he wisely called attention to the importance of the litigation between two States of

the Union, and he properly insisted that the rules applicable to the one would not be strictly applied to the other. Thus he said :

Questions between the different states of the Union, are always of deep concern and of high importance. An appeal to this Court for the decision of such questions, is an application to the highest powers of the Court. Where these questions are for a part of the territory in possession of either of the contending states, occupied by a large population, they become of the deepest and highest interest. Such is the present controversy.[1]

After thus stating, but not dwelling upon the importance of the proceeding, he thus brushed aside an adherence to technicalities which might prevent the administration of justice :

It is submitted, that this Court will not apply the strict rules which govern other cases to this. The peace and tranquillity of the Union may be disturbed by the decision of such a case, however just and proper ; if a belief shall prevail, that every opportunity for its full and complete discussion was not afforded to each party. Although no imputation of wrong would be charged to this Court, which, in conformity with its established rules, had proceeded to the decision of the cause, against the party opposing the application of those rules, under an existing or asserted disadvantage to the opposing party, strong feelings of dissatisfaction and discontent might prevail ; always, if possible, to be prevented between the citizens of neighboring commonwealths.[2]

After these statements, by way of introduction, the Attorney-General thus mentioned in passing the questions involved in the case :

The questions which will be raised in the argument of this case, are of great and general importance ; and some of them have not been decided. Questions of the jurisdiction of this Court in a case between two states ; and whether, if it exists, provision has been made by legislation for its exercise, are involved ; and must be determined in the final disposition of the cause. These questions were raised in the case of the *State of New Jersey* v. *State of New York*, but they were not decided. The weight and interest of these questions were felt, when that case was before this Court some years since. The controversy between those states was adjusted by commissioners, and the case was not decided here.[3]

Turning then to Massachusetts and showing that the continuance could not prejudice the rights of that State as defendant, the Attorney-General said :

To the state of Massachusetts, the postponement of the final decision of this case to the next term, can do no injury. She is in possession of the territory which is claimed by Rhode Island, and the inhabitants of the same are subject and obedient to her laws. Rhode Island, this Court will believe, does not, on other than grounds which she considers will sustain her claims, come into this high tribunal to assert her rights to that territory.[4]

Postponement opposed by Massachusetts.

It would seem that this statement on behalf of Rhode Island was sufficient to cause the court to grant the continuance, but the Attorney-General of Massachusetts was present to oppose it, and his views were heard, although rejected by the court. Thus he said :

The case is one of a character which gives it a peculiar interest ; and which, while it is unsettled, affects the tranquillity of not less than five thousand persons, who are inhabitants of the territory claimed by Rhode Island.[5]

[1] *State of Rhode Island* v. *State of Massachusetts* (11 Peters, 226).
[2] *Ibid.* (11 Peters, 227).
[3] *Ibid.* (11 Peters, 227).
[4] *Ibid.* (11 Peters, 227).
[5] *Ibid.* (11 Peters, 228).

In a later portion of his very brief address, the Attorney-General from Massachusetts stated that 'the cause has been pending for six years ; and two years have passed since the answer of the state of Massachusetts was filed'. The case could have been disposed of, he said, had Rhode Island wished to do so in the two terms which had passed since the filing of the answer, and while the circumstances were appreciated under which the motion for a postponement was made, the Attorney-General of Massachusetts stated on behalf of that Commonwealth that he could not consent to the continuance of the case.

Postponement granted by the Court.

The decision of the court was, as was to be expected, in favour of the postponement, given its attitude toward the States, and Mr. Chief Justice Marshall's great and worthy successor, Mr. Chief Justice Taney, in behalf of his brethren on the day following the argument on the motion, said, to quote the language of the report in full, that 'the court had decided to order the cause to be continued'.[1]

10. State of Rhode Island v. State of Massachusetts.

(12 Peters, 657), 1838.

A boundary dispute.

With the year 1838 the case of *Rhode Island* v. *Massachusetts* entered upon its third phase, the most important of any suit between States in the Supreme Court. The facts disclose a controversy of long standing concerning the boundary between the two States. It appeared from the charters of the two colonies that the boundary line between them was to run east and west from a point three miles south of the Charles River, that in 1642 commissioners ascertained this point, marking it, according to Massachusetts, by a stake, from which the line was drawn. Rhode Island maintained, however, that the point in question was located farther to the south than it should have been, to the advantage of Massachusetts and to the detriment of Rhode Island, that the agreements entered into by the two colonies in 1710–11, to define the boundary and to settle the controversy, were, to quote this phase of the case in the language of Mr. Justice Baldwin stating the contention of Rhode Island and the case upon which the Court was called upon to pass :

> unfair, inequitable, executed under a misrepresentation and mistake as to material facts ; that the line is not run according to the charters of the colonies ; that it is more than seven miles south of the southernmost part of Charles river ; that the agreement was made without the assent of the king ; that Massachusetts has continued to hold wrongful possession of the disputed territory, and prevents the exercise of the rightful jurisdiction and sovereignty of Rhode Island therein. The prayer of the bill is to ascertain and establish the northern boundary between the states, that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs, and they be quieted in the enjoyment thereof, and their title ; and for other and further relief.[2]

As still further showing the exact nature of the dispute, the territory described by the State of Rhode Island in its bill is stated by the Attorney-General of Massachusetts in his argument 'to comprise between eighty and one hundred square miles, being a part of six townships, incorporated under the laws of Massachusetts, with a population of about 5,000 persons, at present citizens of that State'.[3]

[1] *State of Rhode Island* v. *State of Massachusetts* (11 Peters, 228).
[2] *Ibid.* (12 Peters, 657, 716).
[3] *Ibid.* (12 Peters, 657, 669).

Mr. Webster, then the undoubted leader of the American bar, appeared as counsel for the State of Massachusetts, and moved to dismiss the bill filed by Rhode Island on the ground that the Court lacked jurisdiction of the cause of action. The case was elaborately argued by the Attorney-General of Massachusetts and by Mr. Webster ; by Mr. Hazard, then the leader of Rhode Island, and by Mr. Southard, of the State of Rhode Island.

Summary of the facts.

The facts in the case are very complicated, and they are set out in great detail in the pleadings. They are summarized in the statement of the case, to be found in the official report ; they are adverted to at considerable length in the argument of counsel ; and they are admirably stated and grouped in the opinion of Mr. Justice Baldwin, speaking on behalf of the court. As, however, the present phase of the case involves the right of the court to entertain jurisdiction of the bill as maintained by counsel for Rhode Island and denied by counsel for Massachusetts ; as the question of jurisdiction was one particularly argued by counsel, although they went into the facts and the merits of the case, and as the decree of the Court was that it possessed jurisdiction, and could therefore hear and entertain the controversy between the States, it would be sufficient to say that the difference between the States was one of boundary as to where the line separating Rhode Island on the north from Massachusetts on the south—for the two states are contiguous—should be drawn, according to the provisions of the charters from the crown creating the colonies. According to the Charters the boundary between the Colonies was ' a line drawn east and west three English miles south of the river called Charles River, or of any or every part thereof.' The point from which the line was to start was, therefore, the subject-matter of the dispute. If it was where Massachusetts claimed it to be, and where the Court, in the final determination of this case, found it to be, then the existing line between the two States was correct and there was no legal foundation for the dispute. If, on the contrary, the point from which the boundary line was to proceed east and west was where Rhode Island claimed it to be, some three to four miles farther to the north, then the boundary line between the two States would not legally be what it then was, unless there had been an agreement between the colonies binding the States concerning the point and concerning the line itself.

It was claimed by Massachusetts that the point in question had been fixed in 1642 by Messrs. Nathaniel Woodward and Solomon Saffrey, ' skillful, approved artists ; ' that, to settle the boundary dispute between the two colonies, they agreed, in 1709, to appoint commissioners, who actually were appointed, and who, on January 19, 1710, met and entered into an agreement adopting the point said to be fixed by Woodward and Saffrey ; that this agreement was approved by the colonies ; that commissioners on the part of the colonies were, in 1718, appointed to draw the line ; that they met in the course of 1718 agreed upon the location of the stake set up by Woodward and Saffrey as the situation or commencement of the line ; and that the report of the commissioners, submitted to the colonies and approved by them in 1719, stated that they had run the line, placing heaps of stones and marking trees to designate it.

It was denied by Rhode Island that the stake claimed to have been driven by Woodward and Saffrey ever existed, and although the subsequent negotiations,

which 'culminated in the approval of the line and the drawing thereof', were admitted, it was contended that the agreements were unfair; that they were based upon a mistake of facts on the part of Rhode Island, and that the boundary line drawn was, because of the mistake of facts, incorrect; and that it was not the true line between the States.

Massachusetts in possession.

The one point admitted by both Counsel seems to be that Massachusetts was in possession of the territory in question, before as well as after the agreement, as it was at the time of filing the suit.

So much for the facts of the case, so far as they are material to the purpose in hand.

As regards the pleadings, it may be stated that, in 1832, the State of Rhode Island filed its bill against Massachusetts for the settlement of the boundary between the States, at the same time moving for a *subpoena*, according to the practice of the court in similar cases. This motion was held under advisement until the following term, when it was awarded and issued. This was in March 1833. The *subpoena* was served in July of this year, and in January 1834 Mr. Webster, appearing for the defendants, moved a continuation of the cause, with leave to plead, answer, or demur. In January 1835 Mr. Webster filed a plea and answer. In February 1836, by agreement of counsel, the Court ordered that the complainant file a replication to the answer of the defendant under penalty of dismissal. The replication was filed in August 1836, and, at the same term of court, counsel for Rhode Island notified the Court that it moved for leave to withdraw the replication, on the ground that the rule was agreed to and entered into by mistake.

Massachusetts denies the jurisdiction of the Court.

So the case stood upon the pleadings, and so it would have stood if Mr. Webster had not moved, when the case came for hearing, to dismiss the bill filed by the State of Rhode Island on the ground that the Court had no jurisdiction of the case. This was the question, and the sole question, in this phase of the case, and it was wide of the mark to raise and discuss questions of procedure or to descant upon the merits of the case, for the question raised by Mr. Webster eliminated these matters. Counsel addressed themselves to the case, Massachusetts denying the jurisdiction of the court, Rhode Island affirming it. It could not be overlooked by the court because, being of limited, not of general, jurisdiction, it could not entertain and decide the case unless the right so to do had been conferred upon it. Questions of procedure and the merits of the case were of no avail, indeed, they could not come before the court, which was forced, as has so often been said, to decide, on the very threshold of the case, whether it could or could not assume jurisdiction thereof. But it is nevertheless advisable and in the interest of clearness to state the points raised by counsel, although it is unnecessary to enter into details, in order that the nature and extent of the argument may be understood and the importance of the questions raised and discussed, and before the court for its consideration, may be comprehended.

In the official reports of the Supreme Court only the arguments of Austin, Attorney-General of the State of Massachusetts, and of Hazard, chief counsel for Rhode Island, are given, and the main contentions of these luminaries of the bar will be enumerated, in so far as they are material to the question of jurisdiction.

Argument for Massachusetts

Addressing himself to this phase of the subject, the Attorney-General thus outlined the nature and scope of the contention of the State which he had the honour to represent :

Whether the subject of the present suit is a controversy between states, within the meaning of the constitution ; and whether, if it be so considered, a law of congress is necessary to the exercise of judicial power by this Court in the premises ; and whether, if such law be necessary, any sufficient action has been had by congress to authorize judicial proceedings, are questions which, under this motion, are to be examined and decided.[1]

He denied jurisdiction for two reasons :

based on two contentions.

1. Because of the character of the respondent, independent of the nature of the suit.

2. Because of the nature of the suit, independent of the character of the respondent.[2]

By way of comment upon these two points, which went to the root of the matter, he said :

If the first of the propositions can be maintained, the result is, that in the present state of the law, this Court cannot entertain jurisdiction over a state of this Union, for any cause. If that may be doubtful, and the second proposition is established ; it will result in this, that the subject matter of this suit, being for sovereignty and sovereign rights, is beyond the jurisdiction of a judicial court.[3]

To give a Court of the United States jurisdiction, two circumstances must concur :

1st, The party, or the subject of the suit, must be one to which the judicial power of the government extends, as that power is defined by the constitution ; and 2dly, There must be some rule of decision established by the supreme power of the country, by the administration of which the right of the parties to the matter in controversy may be determined.[4]

Origin and nature of the judicial power.

The Attorney-General explained briefly that the United States did not come into possession of judicial powers by inheritance or by succession ; that the government of the United States was a new government, beginning with the Constitution, and that this government may 'exercise all, but no more than all, the judicial power provided for it by the constitution'.[5] He thereupon proceeds to examine the nature and extent of this judicial power, and refers to the third article of the Constitution, which, he says, ascertains the parties, the causes and the courts for judicial action. The Attorney-General examined the term 'controversies', asking if it extends to all controversies ; calling attention to the fact that, in previous clauses, the cases whereof the court shall have cognizance are *all* cases, whereas, in mentioning states, the word *all* is dropped and only controversies are mentioned. From this he draws the conclusion that the judicial power does not include all possible controversies between the States. After this, it would be expected that he would express his opinion as to the limitations. He finds them to be determined by the nature of the tribunal in which they are to be settled, namely, a court which is to administer law and equity. The learned counsel then states that the technical terms, judicial power and cases in law and equity, are to be taken in the sense in which they were used in the English

The court cannot decide political controversies

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 671).
[2] *Ibid.* (12 Peters, 657, 671).
[3] *Ibid.* (12 Peters, 657, 671).
[4] *Ibid.* (12 Peters, 657, 671–2).
[5] *Ibid.* (12 Peters, 657, 672).

system of jurisprudence, with which the framers of the Constitution were familiar. Therefore, he says :

> A judicial power means, therefore, a power to interpret, and not to make, the laws ; and the terms ' law and equity ', have reference to that complicated code of the mother country ; extensive, but not universal, and limited in its operation by well-settled decisions.[1]

In illustration of his meaning he states, in this connexion, that it would be manifestly absurd to bring political questions within the grant of judicial power. Therefore, the controversies of the Constitution must be non-political and such as a Court of justice could determine.

Immediately after stating this limitation, he mentions another, which, if accepted by the Court, would have caused his motion to prevail, but which, at the same time, would have deprived that tribunal of much of the jurisdiction which it has assumed during the course of its history. The controversies between the states must be limited to those, he says, ' which begin with the states in that capacity, and does not extend to the antiquated controversies existing between the colonies, to which the states may or may not have succeeded, according to circumstances, which a judicial court can have no means to ascertain.' [2] Instead, therefore, of *all* controversies, only some could be entertained, and, to be decided by the court, they must be justiciable in the sense of English jurisprudence obtaining at that time. And they must be disputes between the States as such, that is to say, disputes having arisen since the Revolution ; because it is only from this date that the States existed ; the grant of judicial power was only to States, not to colonies ; and apparently, in his opinion, not to States as the successors of colonies. For the exercise of judicial power the law must exist which the court is to apply—in this case, common law and equity—or other law to be created as applicable to the case by act of Congress. The Attorney-General contended, in point of fact, that, as the legislature had not interposed to create this law and to apply it to the States, the provision of the Constitution was not self-executing. It needed a law to put the Court into effect, to regulate the procedure, from summons up to and including judgement and execution, without which last, he says, ' judicial action is a mere mockery.' [3] And it needed a law, as has been stated, to determine the rule by which the case is to be tried, as ' judges are to expound a law, not to make it '.[4]

The jurisdiction does not cover controversies of colonial origin.

No law exists to govern the case.

The Congress had not passed an act prescribing the procedure to be followed in suits against States, and, therefore, there was no procedure upon the subject. And as regards the common law, it was inapplicable, it was different in different States ; and, in any event, it applied to individuals, not to States in their sovereign capacity ; for States, in their sovereign or political capacity, were not suable at common law. The Congress could pass a law to carry into effect the constitutional grant of power in case of suits between States ; but he contended that the Congress had not done so, and, although the States had consented to be sued in the Supreme Court, the law applicable to them was lacking. On this point the Attorney-General was very sure, and, speaking for his State, he said :

No procedure exists.

> Massachusetts does not propose to take herself out of the constitution, or to

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 673).
[2] *Ibid.* (12 Peters, 657, 673). [3] *Ibid.* (12 Peters, 657, 675). [4] *Ibid.* (12 Peters, 657, 675).

withdraw from any of its obligations. She admits, that under certain circumstances, she has agreed to waive her sovereignty, and submit her controversies to judicial decision ; but maintains, that before she can be called upon to do this, a court must be established, a law made, or a code propounded, suitable to the decision of her case ; and the forms of process, mode of proceeding, character of judgment, and means of enforcing it, be first established by legislative authority.[1]

Admitting that a law could be passed regulating disputes of a justiciable nature, he insists that the law to govern the State in its sovereign and political capacity could only be made by itself, and each one for itself alone ; and he proceeds to examine the nature of the controversy between Rhode Island and Massachusetts in order to show that it was not justiciable at law or equity, and, being extra-judicial, that it was untenable. The claim of Rhode Island was not to the soil, it was to exercise jurisdiction over a certain portion of territory which it claimed under its charter, which Massachusetts likewise claimed under its charter and by virtue of possession ; the bill filed by Rhode Island was to extend its jurisdiction over territory wrongfully subject to the jurisdiction of Massachusetts, and, as the bill said, ' extending the whole length of the north line of the colony of Rhode Island, being more than twenty miles in length and four miles and fifty-six rods in breadth, in the east end thereof, and more than five miles in breadth at the west end thereof.' [2] Because of the character of the suit, the Supreme Court has no jurisdiction. It is, to quote the Attorney-General, ' in its character, political ; in the highest degree, political ; brought by a sovereign, in that avowed character, for the restitution of sovereignty.' [3]

The dispute is wholly political.

The judicial power of the United States is, by the Constitution, extended only to cases of law and equity, and ' cases ' are to be understood as comprehending only cases of ' law and equity ' as these terms are used in English jurisprudence. Suits of the present kind, that is to say, suits between States in their sovereign and political capacity, were not determined by law and equity as administered in England, and therefore suits of this kind could not be brought in the Supreme Court of the United States.

Such, in the main, was the argument of counsel for Massachusetts in support of the motion to dismiss the bill on the ground that the court had no jurisdiction in the cause.

The views of Mr. Hazard, representing Rhode Island, were naturally opposed to those of Mr. Austin, who, as Attorney-General, appeared for Massachusetts. The attitude of the latter was negative, although, in the course of his argument, he made one great admission, namely, that by the Constitution the states consented to suit and to be sued in the Supreme Court of the United States. But his argument as a whole was designed to show that the right to suit was limited, and that in this particular instance, the suit being of a political character, the court could not rightfully assume jurisdiction, notwithstanding the general consent in ratifying the Constitution.

Argument for Rhode Island.

Mr. Hazard's attitude, on the contrary, was affirmative. He, too, admitted that the States forming the United States had consented to suit by the Constitution, that the Supreme Court had jurisdiction of controversies between the States. But he went further, contending that this jurisdiction extended to all controversies susceptible of determination by courts of justice, inasmuch as the consent to suit vested the

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 678–9).
[2] *Ibid.* (12 Peters, 657, 680). [3] *Ibid.* (12 Peters, 657, 685).

court with jurisdiction of a class of cases which, without this consent, would have been non-justiciable ; that the case in question, although one involving sovereignty in theory, was in fact one praying the determination of a boundary, based upon the location of a point in question, from which the line separating the erstwhile colonies, now States, should be drawn in accordance with the terms of the charter ; that the interpretation of a charter as a written instrument was a judicial question ; that the location of the line, following the location of the point fron which it should be drawn, determined the whole question, inasmuch as the sovereignty of Rhode Island would extend to the boundary line wherever it might be drawn ; and that a court of equity was competent to locate the point and to draw the line.

The interpretation of a charter is a judicial question.

While this may be taken as a fair summary of his affirmation, it is nevertheless advisable to allow Rhode Island to speak by the mouth of counsel, just as the views of Massachusetts were stated by the Attorney-General. Mr. Hazard's position in the argument was more difficult than that of the counsel from Massachusetts, inasmuch as the motion to dismiss had been made at this term of the court and the specific grounds in support of it were not put in writing, as counsel for Rhode Island had requested, in order that they might be had in advance, considered, and met in oral argument. As Mr. Hazard himself said :

> We are now to answer this motion, verbally made, and to seek for the grounds of it, as they are scattered through a long and desultory argument ; in the course of which, those grounds have taken so many different shapes, that it is not easy to recognize them for the same, or to reconcile them one with another.[1]

However, Mr. Hazard stated that, as he understood them, they could be reduced to the following :

> Has this Court jurisdiction over the subject matter of, and over the parties to, the bill in equity now pending before it ? and has the Court now power to proceed to the hearing and trial of the cause, and to make a final decree therein ? [2]

Taking up the first question, Mr. Hazard said that ' It is evidently purely a constitutional question, arising under the constitution, and only to be tried and settled by it '.[3] By this Constitution the judicial power extends to controversies between two or more States, and in such a controversy the Supreme Court is to have original jurisdiction. The present controversy, between two States and pending in the Supreme Court, fell within the express words of the Constitution. But it was contended on the part of Massachusetts that it was not within the meaning and intent of that instrument, and that, on the contrary, it was the intention of its framers to exclude such controversies from the jurisdiction of the court. However, it was not necessary to speculate upon this phase of the subject, as the means were at hand of determining their intention by a resort to the history of the Convention and to the history of the times. Mr. Hazard here entered the field of history, in order ' to trace this constitutional provision for preserving harmony among the states from its origin '.[4]

This is a ' controversy ' within the meaning of the Constitution.

Historical arguments.

In the first place, he recalled that, before the Revolution, controversies between the colonies or provinces concerning boundaries were laid before the King in council and decided by him. He referred, in passing, to a controversy between the same

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 687).
[2] *Ibid.* (12 Peters, 657, 687). [3] *Ibid.* (12 Peters, 657, 687). [4] *Ibid.* (12 Peters, 657, 688).

parties, Massachusetts and Rhode Island, to another between Massachusetts and New Hampshire, both of which were decided by the King in council adversely to the contentions of Massachusetts. With the Declaration of Independence the colonies separated from the mother country and the jurisdiction of the King in council ceased to exist. Nevertheless, the States felt the necessity of some method of settling their controversies. Therefore in the 9th of the Articles of Confederation, they provided that 'Congress shall also be the last resort on appeal in all disputes and differences now subsisting or which may hereafter arise between two or more States concerning boundary, jurisdiction, or any other cause whatever'. The decisions of these differences, submitted to a temporary court appointed by the Congress, were to be final, the article saying :

The Articles of Confederation.

And the judgment and sentence of the court to be appointed in the manner before prescribed, shall be final and conclusive ; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner, be final and decisive, the judgment or sentence, and other proceedings being, in either case, transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned.

Mr. Hazard called attention, in this connexion, to the view that differences between the colonies and the States were sure to arise because the descriptions and boundaries contained in the colonial grants and charters were necessarily loose and defective ; and that, in the progress of settlements in adjoining colonies, controversies would arise as to limits, and 'the greater the certainty of such conflicts, the greater was the necessity of providing an impartial tribunal for the peaceable adjustment of them'.[1]

In this connexion, Mr. Hazard referred to the Attorney-General's statement that the United States came into existence with the present Constitution, and that Massachusetts, as one of them, was bound by nothing before that date. This was, Mr. Hazard stated, a strange conception, inasmuch as not merely states as such but the United States came into existence with the Declaration of Independence, and the first of the Articles of Confederation spoke of them as the United States of America. A union existed, and the purpose of the Philadelphia Convention was to form a more perfect union than the one existing under the Articles ; and he quotes the resolution of Congress recommending the call of the Convention 'for the sole and express purpose of revising the articles of confederation'.

The reason for this excursion into history becomes evident in the succeeding passage of Mr. Hazard's argument, which, in justice to him, should be stated in his own words :

The convention met ; and in revising the important ninth article, changed the words 'disputes and differences', to the word 'controversies', taking the words 'between two or more states', as they found them in the article.[2]

Most controversies between the States concerned boundaries.

The most numerous, if not the only, controversies between the States were those concerning boundary, and the delegates representing the States in the Convention knew that a number of controversies existed between the States, that more might exist ; and, fearing the consequences, provided a method to prevent their outbreak.

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 689).
[2] *Ibid.* (12 Peters, 657, 690).

For was not the great object of the Convention, as Mr. Hazard says, quoting the preamble of the Constitution, 'to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and to our Posterity?'

Upon this preamble as a peg, Mr. Hazard hangs, as it were, a series of questions:

And how was union to exist? How domestic tranquillity, amidst contention among the members? How was justice to be established, if the strong were permitted to give law to the weak? and how were the rights of individual states to be preserved, if left unprotected from the encroachments of stronger neighbours? And what would become of the harmony and integrity of the Union, if all its members were not protected in the enjoyment of their equal rights?[1]

The question of jurisdiction settled in the Convention.

But, Mr. Hazard says, the very question of jurisdiction, now invoked by Massachusetts, was raised and settled in the Convention, as appears from the record of its proceedings. Thus, he says:

During its deliberations, the question was distinctly brought up, whether controversies between states, concerning jurisdiction and boundaries, should not be excluded from the jurisdiction of the courts. And the convention decided, that they should not be excluded. And the provision in the constitution, as it then was and still is, was retained; and this constitution was unanimously agreed to by all the delegates.[2]

Mr. Hazard finds a further confirmation of his opinion in the 11th amendment, which withdrew from the Supreme Court jurisdiction of suits against the States brought by citizens of other or foreign States, but which left untouched controversies between the States, which would likewise have been withdrawn had the States not been satisfied with the provision of the Constitution under consideration.

Leaving what may be called the historical phase of the question, Mr. Hazard addressed himself to the technical and legal objections to jurisdiction on the part of the court. The specific objections made by the counsel for Massachusetts were, in Mr. Hazard's opinion, 'that a controversy between states, concerning jurisdiction and boundaries, is political, not judicial, in its character; that judicial courts can take cognisance only of controversies strictly judicial, not political, in their nature; that the present controversy concerns jurisdiction and sovereignty, and is therefore out of the judicial jurisdiction of this Court; and cannot be acted upon by it, without the assumption of political power.'[3]

English precedents examined.

After mentioning that opposing counsel cited a number of English cases and the opinions of English chancellors upon the subject, in support of their views, and that they referred to the controversies between the colonies concerning their boundaries, and mentioning also, in support of their contention, that the disputes of the colonies concerning boundaries were decided by the King in council, not by the courts, Mr. Hazard asks: 'Why did they not?' To which he gives the very pertinent answer, in the form of comment, which it would seem difficult to state in clearer, more precise or more accurate terms. 'It was', he said, 'because there was a higher tribunal, which the colonies appealed to. The jurisdiction, in those cases was in the King himself. He made the colonial grants, and gave the charters; reserving in them all allegiance to himself. He appointed the colonial governors; not excepting the governor of Massachusetts. Rhode Island almost alone, elected her own

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 690).
[2] *Ibid.* (12 Peters, 657, 690–1).
[3] *Ibid.* (12 Peters, 657, 691).

governors. He, the king, therefore claimed and exercised jurisdiction over the colonies, as their feudal lord. But, had he so pleased, he might have transferred his royal jurisdiction 'over those controversies, to any of his courts '.[1] Mr Hazard's views on this point could not be controverted, and they were adopted by the court in its opinion, as was also the consequence which he drew from this procedure, and which must be the argument of all who believe that political questions can and will become judicial if referred to a court for settlement. Thus he said, and the Supreme Court, as stated, only followed his views in this particular :

> And had he done so, those controversies, whatever their character, and by whatever name called, political or civil, would have become the proper subjects of judicial investigation and decision.[2]

After a reference to a leading English case, that of the *Nabob of the Carnatic* v. *East India Company*, in which one of the parties was a sovereign prince and the other treated as an independent State, and therefore neither was subject to suit without consent, as being above the law as it then was, Mr. Hazard asks :

> But suppose, that its charter had subjected it to the jurisdiction of the court of equity, in any controversies it might have with any of the surrounding princes, would the character of the parties (the foreign prince assenting to the jurisdiction) or the nature of the controversy, have formed any obstacle to the exercise of that jurisdiction? And would not the exercise of it have been strictly judicial in its character?[3]

Leaving the English cases and coming to the provisions of the Constitution regarding controversies, Mr. Hazard says :

> If this jurisdiction is vested in the court, by the constitution, how preposterous is it to talk of the nature of the controversy, or the character of the parties.[4]

And he puts a series of illustrations, which had the good fortune of impressing the court, and received its approval. Thus :

> Suppose, the controversy is political in its nature : what then ?—Is there any reason in nature why it should not be subjected to judicial investigation and decision, as much as any other controversy ? Suppose, the parties to it are two states : what then ?—Is there any reason in nature why they should not be governed by the laws and principles of justice, as much as any other parties ?[5]

These are questions which he answers without difficulty, and which the Supreme Court of the United States likewise answers without difficulty and in the same way, but before which the world at large appears to be dumb. The answer given by learned counsel and the Supreme Court is as true as it is full of warning :

> All controversies, whatever their character, and whoever the parties, if they are ever settled, and the parties will not settle them amicably, must be settled either by force or by the judgment of some tribunal. When the controversy is between sovereigns, the sword is the last resort, the *ultima ratio regum* ; and the contest is waged at the expense of the blood and lives of their subjects. But if the controversy is submitted to some independent tribunal ; that tribunal, call it by whatever name we may, must act judicially.[6]

The jurisdiction covers all controversies.

With a further illustration, which may be omitted, Mr. Hazard ends his argument on the first point, and passes to the consideration of the second question which he

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 692).
[2] *Ibid.* (12 Peters, 657, 692). [3] *Ibid.* (12 Peters, 657, 692). [4] *Ibid.* (12 Peters, 657, 692).
[5] *Ibid.* (12 Peters, 657, 692–3). [6] *Ibid.* (12 Peters, 657, 693).

believed to be involved: 'Has the Court now power to proceed to the hearing and trial of this cause, and to make a final decree thereon?' As under the previous heading, so under the present, Mr. Hazard summarizes the objections of Massachusetts to this phase of the question, which in his opinion were:

Massachusetts' arguments criticized.

1. That the sole province of the court is to expound and administer the law; and that here is no law for the Court to expound or administer. That congress has passed no act defining the controversy; no act prescribing the rule by which to try it; no rule of decision. 2. That by the 13th section of the judiciary act of 1789, congress has limited the jurisdiction of this Court, where a state is a party, to controversies of a civil nature; which this controversy is not, being political in its character; and that, therefore, congress meant to exclude controversies of this character from the jurisdiction. 3. Congress has passed no act providing the process necessary to enable the Court to exercise its jurisdiction in the case. 4. That the Court possesses no power to carry a final decree in this cause into effect, should it make one; congress, as is alleged, having made no law to enable it to do so.[1]

It is not necessary to dwell at length upon the first statement of the objections, for the reason, stated by Mr. Hazard, that the Supreme Court has original jurisdiction of cases between States, that it cannot be deprived of its jurisdiction in such matters by an act of Congress, nor be restrained in its exercise of this jurisdiction, as an act of Congress of this nature would be declared unconstitutional by the Court. And it is not necessary to refer to it further, in view of the fact that the Supreme Court had taken jurisdiction in the cases of *New York* v. *Connecticut*, and of *New Jersey* v. *New York*, and had devised a method of procedure for the conduct of cases of this kind; namely, a *subpoena* to be served upon the Governor and Attorney-General of the defendant State to compel an appearance, and if the State did not appear in obedience to the *subpoena*, to allow the plaintiff state to present its case *ex parte* in the absence of the defendant, leaving open the question as to the form of the decree and the manner of enforcing it.

Absence of a specific law no objection.

In reply to the objection on the part of counsel for Massachusetts, 'that there is no law for the court to expound or to administer; the congress has passed no act defining the controversy; no act prescribing the rule by which to try it; no rule of decision,' Mr. Hazard again invoked the argument of history, not in general, but that special portion of it concerned with the Articles of Confederation. The idea that these things should be necessary was, he said, 'beyond the conception of the men who framed the articles of confederation. It did not enter into their heads that anything more was necessary to be done, to meet the exigency, than to establish a competent Court, with sufficient powers to call the parties before them; and to try and determine these controversies in the same way as they would any other controversies between any other parties'. And referring to the court of appeals, apparently meaning the court of appeals in prize cases, he says that it 'had the same idea of its province and duties, and found no difficulty in performing them; governing themselves by the principles and rules of justice, equity, and good conscience, and not dreaming that any different rule was furnished by the common law, or the civil law, or by any state law'.[2]

Mr. Hazard thereupon takes up the second objection, found in the 13th section

[1] *State of Rhode Island* v. *State of New York* (12 Peters, 657, 695–6).
[2] *Ibid.* (12 Peters, 657, 697).

of the Judiciary Act, vesting the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a State is a party, and alleging that this is a limitation upon the jurisdiction of the Supreme Court, disenabling it to accept jurisdiction of political controversies, even it were otherwise competent to do so. The plain object of Congress was, according to Mr. Hazard, ' to withhold from the inferior courts jurisdiction in controversies between two or more states. And to do this, they gave to the Supreme Court exclusive jurisdiction in those cases, instead of original jurisdiction merely, which it had by the constitution '.[1] It was proper to use the word *civil* in the statute in this connexion, because, as Mr. Hazard says, ' all controversies which do or can exist between two or more states, must be of a civil nature, and none other ; unless they engage in war, which they have bound themselves by the constitution not to do. The word civil does not mean amicable or peaceable ; actions of trespass and of ejectment are civil actions. Civil is technically and generally used in contradistinction to criminal. There is not the slightest ground for supposing that the word civil was intended to be used in contradistinction to political '.[2] Mr. Hazard appears to be upon firm ground in this passage, for it will be recalled that Mr. Justice Iredell, in the *Chisholm* case, referred to the use of the word ' controversies ' instead of ' cases ', for the express purpose of excluding criminal suits and of limiting them to civil, as distinct from criminal, suits.

No distinction between ' civil ' and ' political ' controversies.

But to return to Mr. Hazard, who continues :

Congress would never have taken so blind a way, so unintelligible and futile, to effect such an object as the counsel of Massachusetts wish to effect. Nor can any such distinction be made. If this is a political controversy, so is it a civil controversy. And if such a distinction could be forced upon the words, it would bring the section to this construction ; that the Court is left to its original jurisdiction derived from the constitution, in this and other like controversies between states ; but does not take exclusive jurisdiction of them, by virtue of this section of the judiciary act.[3]

Mr. Hazard now takes up the third objection of Massachusetts, speaking through its counsel : ' The congress has provided no forms of process to enable the Court to exercise its jurisdiction.' This objection, not very important in Mr. Hazard's opinion, is treated under two headings : the first setting forth the action of Congress, and the second the action of the Court.

Under the first heading it is only necessary to refer to the 14th section of the Judiciary Act of 1789, giving the courts of the United States power to issue certain writs, specifically mentioned, 'and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law '—a provision quoted and relied upon, as will be recalled, by Mr. Justice Iredell in his opinion in the *Chisholm* case—and to the 17th section of the same act, providing ' that all the before-mentioned courts of the United States shall have power to make and establish all necessary rules for the ordinary conducting business in such courts, provided such rules are not repugnant to the laws of the United States '.[4]

The Court can make rules of procedure.

Coming to the Court, Mr. Hazard calls attention to the rules which have previously been quoted, providing that a *subpoena* be issued against the defendants, that the plaintiff may proceed with the case *ex parte* if the defendant does not appear,

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 698).
[2] *Ibid.* (12 Peters, 657, 698). [3] *Ibid.* (12 Peters, 657, 698). [4] *Ibid.* (12 Peters, 657, 700).

and enumerates the various cases in which the Supreme Court issued process in suits against States, both before the rules were framed and in consequence of them. These do not need to be mentioned again, as they are sufficiently stated in the opinion of Mr. Chief Justice Marshall in the second case of *New Jersey* v. *New York* (5 Peters, 284). After quoting a portion of the judgement of the Court in the case last mentioned, Mr. Hazard asks the very pertinent question : ' Why should not the court proceed in this case, as they decided to proceed in that ; and in conformity to its subsisting rules and orders ? ' [1]

A final decree need not be followed by execution.

Mr. Hazard then takes up the fourth and the most difficult objection, that the Court would have no power to carry into effect the final decree which it might make, and that it should not make the decree if it could not carry it into effect, with the implication that it should not assume jurisdiction if it could not proceed to execution of the judgement or decree which it might render. Inasmuch as this phase of the question, however important and interesting it may be, is not involved in the question of jurisdiction, or only incidentally so, and inasmuch as the Supreme Court has assumed jurisdiction in many controversies between States, it does not seem necessary to enter upon this question or to dwell upon it in this place. The rule of Chief Justice Marshall in the case of *New Jersey* v. *New York* is certainly one to be followed, in spirit as well as in letter, and not to attempt to decide the process which the court may devise to compel compliance with its judgement or decree until that question has actually arisen. Mr. Hazard was quite sure that the grant of jurisdiction carried with it a process to ensure the execution of its decree, and, in any event, he was certain that, in the present case, the court could do so, saying :

A final decree in this cause will have no resemblance to a judgment of Court for a sum of money, to be collected on execution ; nor to a judgment in ejectment, to be followed by an execution for possession. No process would necessarily follow a final decree in this cause.[2]

The reason for this he thus states :

Rhode Island only asks for a decree.

We ask no damages of Massachusetts ; no delivery of possession ; no process to compel her to do or undo anything. All we ask is a decree, ascertaining and settling the boundary line between the two states.[3]

At this point of his argument, Mr. Justice Thompson reminded him that the bill contained the prayer that Rhode Island be restored to its rights of jurisdiction and sovereignty over the territory in dispute and quieted in its enjoyment thereof. This, Mr. Hazard admitted, but broke the force of the question by saying that :

All Rhode Island asked for was a decree ascertaining and establishing the true boundary line between her and Massachusetts. When that is settled by a decree, the rights of jurisdiction and sovereignty will necessarily follow : the decree will execute itself ; and this controversy can no longer exist. When the boundary line is settled, it will be the same as all other established boundary lines ; and the relative situation of Rhode Island and Massachusetts will be the same as that of all other adjoining states.[4]

In support of this statement, in the nature of a contention, he asks :

Am I not sustained in the position I have here taken, by the opinions and acts of the learned men who framed the articles of confederation ? They enacted, that

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 704).
[2] *Ibid.* (12 Peters, 657, 706). [3] *Ibid.* (12 Peters, 657, 705). [4] *Ibid.* (12 Peters, 657, 706).

the decrees of the court of appeals, in the cases over which jurisdiction was given to it, should be final and conclusive. And it was their opinion, that nothing more than a final decree would be necessary ; and, therefore, they provided for no further proceedings.[1]

Mr. Hazard, however, was not satisfied to let the matter rest here. Apparently of an historical turn of mind, he pressed history again into service, in a manner which probably galled counsel for Massachusetts and certainly impressed the Court he was addressing, if Mr. Justice Baldwin's opinion, speaking in their behalf, can be taken as evidence of this. He recalled the controversies which Massachusetts had had with its neighbours, enumerating all of them, and alleged that Massachusetts was, in every instance, the aggressor. ' But,' he said, ' when those boundaries were ascertained by the competent tribunals, all difficulties were at an end. When Rhode Island, upon the decision of the king in council, received under her jurisdiction, her county of Bristol, and her towns of Tiverton and Little Compton, over which Massachusetts had long exercised jurisdiction, she met with no obstructions from that state. Neither did New Hampshire, whose controversy with Massachusetts was decided by the same tribunal.' [2] In view of these circumstances, Mr. Hazard was not inclined to think that Massachusetts would fail to abide by the decree of the Supreme Court, as in colonial days it had loyally acceded to and complied with the decisions of the King in council.

Repeated aggressive conduct of Massachusetts.

With this statement Mr. Hazard's argument might end ; but following, as he alleged, the example of counsel for Massachusetts, he discourses somewhat, in conclusion, upon the merits of the case, stating, among other matters, that the point in dispute was one to be settled by a proper construction of the charters, as the case depended upon the charters of Massachusetts and Rhode Island, and solely upon them. In support of his contention that the question was judicial, and that it might be ascertained in a judicial proceeding, he called attention to a controversy between Massachusetts and New Hampshire, on the one hand, and also an earlier controversy between Massachusetts and Connecticut. Of the first of these concrete instances, he says :

> Precisely the same question was decided more than an hundred years ago, in the controversy between Massachusetts and New Hampshire. The northern boundary of Massachusetts is defined and limited in her charter, in the same terms as her southern boundary. She was to have three miles north of the most northerly part of the Merrimack river. Upon this she set up the same claim upon New Hampshire, as she now does upon Rhode Island ; and by her construction, she would have taken the whole of New Hampshire, and the greater part of the province (now state) of Maine.[3]

So much for the misdeeds of Massachusetts to the north. Finally, as to the south.

> Massachusetts, also, had precisely the same controversy with the state of Connecticut, about the westerly part of this same line ; that state and Rhode Island, by their charters (granted about the same time, 1662–3), being both bounded northerly upon the same straight line, to be drawn due east and west throughout. But Connecticut would not submit to the encroachments of Massachusetts. And, although she had entered upon a written agreement with her, establishing the line as it then was ; and that agreement had been formally ratified and confirmed by the legislatures of

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 706).
[2] *Ibid.* (12 Peters, 657, 706–7).
[3] *Ibid.* (12 Peters, 657, 712).

both states, (which was never the case with us ;) yet Connecticut proved, that misrepresentations and impositions had been practised upon her commissioners and government, in the running of that line ; and she brought Massachusetts to a sense of justice, and obtained from her a large part, and not the whole of the territory which the latter had wrongfully taken within her limits.[1]

After having thus stated and illustrated the iniquity of Massachusetts as regards New Hampshire and Connecticut, Mr. Hazard thus concludes the relevant portion of his argument, with a very happy but not wholly gracious thrust at counsel for Massachusetts, in which the Commonwealth itself was not spared. Thus :

And now, whenever you look upon any map including the three states, or that part of them, you see the Connecticut northern line is miles in advance of that of Rhode Island, which ought to be a continuation of it ; and the government of Massachusetts has not caused, and cannot cause, any survey or map of that fine state to be taken or published ; without recording anew and emblazoning her unjust encroachments upon Rhode Island.[2]

Decision of the Court accepting jurisdiction.

The judgement of the court, accepting jurisdiction in the case, was delivered by Mr. Justice Baldwin on behalf of the court. It was not the unanimous opinion of his associates, inasmuch as Taney, Chief Justice, dissented, on the ground that the controversy was political, involving an exercise of sovereignty, and therefore not included in the grant of judicial power made by the States to their agent, the United States, and to be exercised in the Supreme Court. After stating the facts of the case and the contentions of counsel representing the states in controversy sufficient to disclose the origin and nature of the suit, but not sufficiently full or detailed to disclose the merits, as it would have been upon the hearing of the case as such, Mr. Justice Baldwin took up the one question which a court of limited jurisdiction must always consider before it entertains a case. Thus, he said :

However late this objection has been made, or may be made, in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause ; as any movement is necessarily the exercise of jurisdiction.[3]

This passage from the opinion states the necessity under which the court is placed of satisfying itself of its legal right to entertain the case. In the very next sentence the learned justice defines jurisdiction, because, in order to decide whether the court possesses jurisdiction, the exact nature and meaning of the term must be comprehended. Therefore, the learned Justice continues, saying :

Jurisdiction defined.

Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them ; the question is, whether on the case before a court, their action is judicial or extrajudicial ; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction ; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it.[4]

It will be observed that the learned Justice refers specifically to an inferior or appellate court of the United States, because, as has been pointed out, the federal court is not a court of general or unlimited jurisdiction. It obtains nothing from

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 712).
[2] *Ibid.* (12 Peters, 657, 712). [3] *Ibid.* (12 Peters, 657, 718). [4] *Ibid.* (12 Peters, 657, 718).

inheritance, it owes everything to its creation, and can only exercise the judicial power conferred upon it by the law of its constitution. After illustrating the difference between the two systems, and stating the procedure appropriate in each, the learned Justice proceeds to point out a distinction, which should not be lost sight of, saying :

What objections can and cannot be waived.

An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue 10 Pet. 473 ; *Toland* v. *Sprague*, 12 Peters, 300 ; but when the objection goes to the power of the court over the parties, or the subject matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill.[1]

An informality may be waived and a privilege may be renounced, but the act of a private litigant cannot invest the court with a power not conferred upon it by the law of its creation, or by statute ; and these objections may be taken at any time, and, whenever taken, are fatal to the case if sustained. As Mr. Justice Baldwin says, speaking of the Supreme Court :

But as this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act ; and proceeding without the limits prescribed, is coram non judice, and its action a nullity. 10 Peters, 474 ; S.P. 4 Russ. 415. And whether the want or excess or power is objected by a party, or is apparent to the Court, it must surcease its action, or proceed extra-judicially.[2]

This being the case, the learned Justice, putting in practice the doctrine which he has laid down, proceeds to determine whether the Supreme Court has jurisdiction of the parties, that is to say, in this case, States, and whether it has jurisdiction of the subject-matter, in this case controversies between them. Thus, he says :

Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. So they have been considered by this Court, through a long series of years and cases, to the present term ; during which, in the case of the *Bank of the United States* v. *Daniels*, this Court has declared this to be a fundamental principle of the constitution : and so we shall consider it in deciding on the present motion. 2 Peters, 590–1.[3]

Jurisdiction over the parties

Having thus declared that, in the opinion of the court, the parties to this action are States, sovereign within the sphere of the reserved powers which they have not granted to the United States as such, he proceeds to consider whether, and if so to what extent, they have parted with the immunity from suit which sovereign States possess. On this point he uses language as applicable to that union of states which we call the United States as it is and will assuredly one day be found applicable to that Society of States which exists, but is unfortunately unconscious of its rights and duties. Thus :

arises by the consent of the sovereign States themselves.

Those states, in their highest sovereign capacity, in the convention of the people thereof ; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, 6 Wheat. 651 ; 8 Wheat. 584, 88 ; adopted the constitution,

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 719).
[2] *Ibid.* (12 Peters, 657, 720).
[3] *Ibid.* (12 Peters, 657, 720).

by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution it was ordained that this judicial power, in cases where a state was a party, should be exercised by this Court as one of original jurisdiction. The states waived their exemption from judicial power, 6 Wheat. 378, 80, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this Court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified.[1]

Jurisdiction over the subject-matter

Having thus determined that the Supreme Court possesses jurisdiction of the States because created by them as their agent in the administration of justice between and among themselves, he then proceeds to consider the second great question involved; whether the Court has jurisdiction of the subject-matter. On this point he again uses language susceptible of international application, because the provision of the Constitution in question was devised by delegates of free, sovereign, and independent states, if their solemn statement to that effect in the second of the Articles of Confederation could make them so. Thus:

Our next inquiry will be, whether we have jurisdiction of the subject matters of the suit, to hear and determine them.

That it is a controversy between two states, cannot be denied; and though the constitution does not, in terms extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is, therefore, a question of construction, whether the controversy in the present case is within the grant of judicial power.[2]

To determine this the Court, for whom Mr. Justice Baldwin spoke, was not obliged to speculate upon the reason of the thing, but could refer to the proceedings in that conference of the States in Philadelphia and to its ratification, stating and defining the nature of the power to be exercised by the court:

depends on the words of the Constitution.

The solution of this question must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the constitution.[3]

In this connexion, attention is called to the fact that the intervention of the legislature of the Congress was necessary to give effect to its provisions, in the present case to create the Federal Courts and to apportion jurisdiction among them; but that, in so doing, the legislature would necessarily be bound by the Constitution, leaving with the Supreme Court the original jurisdiction with which it was vested. After quoting the 13th section of the Judiciary Act of 1789, to the effect that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature to which a State is a party, the learned Justice proceeds to remark:

The power of congress to make this provision for carrying into execution the judicial power in such cases, has never been, and we think cannot be, questioned; and taken in connection with the constitution, presents the great question in this cause, which is one of construction appropriate to judicial power, and exclusively of judicial cognizance, till the legislative power acts again upon it.[4]

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 720).
[2] *Ibid.* (12 Peters, 657, 721). [3] *Ibid.* (12 Peters, 657, 721). [4] *Ibid.* (12 Peters, 657, 722).

Such being the case, it is for the Court to determine whether it shall or shall not entertain a bill, and thus exercise jurisdiction. There is no escape from this conclusion, for the Constitution, having vested the Supreme Court with original jurisdiction in controversies between States, only the court could determine whether it should or should not assume jurisdiction, and, in the exercise of its discretion, it could not be controlled by the legislative or executive departments. It might be wrong, but if so, its exercise of jurisdiction in such cases could only be corrected by an amendment of the Constitution, as in the case of *Chisholm* v. *Georgia* (2 Dallas, 419), withdrawing from it the power which it had claimed and exercised. The question, therefore, before the Court was—and in all such cases necessarily is—as stated by Mr. Justice Baldwin, whether it will exercise its jurisdiction, ' as to give a judgment on the merits of the case as presented by the parties, who are capable of suing and being sued in this Court, in law or equity, according to the nature of the case, and controversy between the respective states '.[1]

On the face of the Constitution the court clearly had jurisdiction, for if ' all ' was not prefixed to ' controversies ', no exception was made of any, and the learned Justice stated that the Supreme Court, ' in construing the constitution as to the grants of powers to the United States, and the restrictions upon the states, has ever held, that an exception of any particular case, presupposes that those which are not excepted are embraced within the grant or prohibition ; and have laid it down as a general rule, that where no exception is made in terms, none will be made by mere implication or construction '.[2] Tried by the canons of construction, which Mr. Justice Baldwin laid down in the general terms quoted, and which he proceeded to elaborate in detail, it was inevitable that the Court should assume jurisdiction in the case :

Text of the Constitution.

' Controversies between two or more states,' ' all controversies of a civil nature, where a state is a party ; ' are broad comprehensive terms ; by no obvious meaning or necessary implication, excluding those which relate to the title, boundary, jurisdiction, or sovereignty of a state.[3]

Having thus expressed the opinion of the Court against whittling down its jurisdiction by reading exceptions into the Constitution which are not stated and which do not follow from necessary implication, he now plunges, *in medias res*, asking, ' What, then, are " controversies of a civil nature " between state and state, or more than two states ? ' In order to answer this inquiry correctly, he calls attention to a presumption of fact and to a principle of constitutional construction, saying, in regard to the presumption :

We must presume that congress did not mean to exclude from our jurisdiction those controversies, the decision of which the states had confided to the judicial power, and are bound to give to the constitution and laws such a meaning as will make them harmonize, unless there is an apparent, or fairly to be implied, conflict between their respective provisions.[4]

As to the principle of construction, he says :

Contemporanea expositio

In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted, 12 Wheat. 354 ; 6 Wheat. 416 ; 4 Peters, 431–2 ; to ascertain the old law, the mischief and the remedy.[5]

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 722).
[2] *Ibid.* (12 Peters, 657, 722).
[3] *Ibid.* (12 Peters, 657, 723).
[4] *Ibid.* (12 Peters, 657, 723).
[5] *Ibid.* (12 Peters, 657, 723).

Applying this principle, which is incontrovertible and expressed in briefest terms, he continues :

The boundary disputes pending in 1787.

It is a part of the public history of the United States, of which we cannot be judicially ignorant, that at the adoption of the constitution, there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies. New Hampshire and New York contended for the territory which is now Vermont, until the people of the latter assumed, by their own power, the position of a state, and settled the controversy, by taking to themselves the disputed territory, as the rightful sovereign thereof. Massachusetts and Rhode Island are now before us. Connecticut claimed part of New York and Pennsylvania. She submitted to the decree of the council of Trenton, acting pursuant to the authority of the confederation, which decided that Connecticut had not the jurisdiction ; but she claimed the right of soil till 1800. New Jersey had a controversy with New York, which was before this Court in 1832 ; and one yet subsists between New Jersey and Delaware. Maryland and Virginia were contending about boundaries, in 1835, when a suit was pending in this Court ; and the dispute is yet an open one. Virginia and North Carolina contended for boundary till 1802 ; and the remaining states, South Carolina and Georgia, settled their boundary in the April preceding the meeting of the general convention, which framed and proposed the constitution. 1 Laws U.S. 466. With the full knowledge that there were, at its adoption, not only existing controversies between two states singly, but between one state and two others, we find the words of the constitution applicable to this state of things, ' controversies between two or more states '.[1]

Boundary disputes seem to be the only differences between the States at the adoption of the Constitution, and Mr. Justice Baldwin properly states that it would be a forced construction which would reject the only class of disputes then existing and embrace others arising in the future, and of a different kind with which the delegates of the Convention were not familiar and could not well foresee. This conclusion in favour of boundary disputes, which seems inevitable from the situation of affairs at the time of the Convention, he re-enforces by a line of argument based upon the text of the Constitution, which is unnecessary to support jurisdiction in the case of the United States, but which throws light upon the reasonableness of judicial settlement and the necessity of interposing it between diplomacy and war. Thus, he says :

The States are debarred from diplomatic action.

By the first clause of the tenth section of the first article of the constitution there was a positive prohibition against any state entering into ' any treaty, alliance or confederation : ' no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering ' into any agreement or compact with another state, or with a foreign power, without the consent of congress ; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plenitude of their sovereignty they might ; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty ; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole* v. *Fleeger*, 11 Peters, 209 ; whereby their compacts became of binding force

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 720).

and finally settled the boundary between them ; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights ; and are to be treated to all intents and purposes, as the true real boundaries. 11 Peters, 209 ; S.P. 1 Ves. sen. 448, 9 ; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this Court.[1]

If a compact between the states of the Union is a judicial question, it is difficult to see how the interpretation of the charters of the colonies, defining the boundaries of Massachusetts and Rhode Island, was not a judicial question. If the construction of a compact as to boundaries is a judicial question, it would seem to follow that the controversies were as judicial as the compacts. 'We cannot', says the learned Justice, 'make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them ; nor refuse to include them within one general term, when they have uniformly been included in another.' There was, however, in his opinion, an additional reason in the case of boundaries, for controversies concerning them are, he said, 'more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable ; and as the large and powerful states can take possession, to the extent of their claim ; and the small and weak ones must acquiesce and submit to physical power ; the possession of the large state must consequently be peaceable and uninterrupted ; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress ; a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession ; but when it is known, that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.'[2] For these reasons, the learned Justice therefore concludes this part of the discussion :

These controversies are interminable unless settled by the Courts.

There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power ; the former is limited in express terms, to assent or dissent, where a compact or agreement is referred to them by the states ; and as the latter can be exercised only by this Court, when a state is a party, the power is here, or it cannot exist. For these reasons, we cannot be persuaded that it could have been intended to provide only for the settlement of boundaries, when states could agree ; and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement.[3]

The correctness of the conclusion to which the learned Justice had come, by an analysis of the provisions of the Constitution, was supported by a reference to the procedure under the 9th of the Articles of Confederation, by virtue of which differences between the States concerning boundaries were adjusted. One of the greatest

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 724–5).
[2] *Ibid.* (12 Peters, 657, 726).
[3] *Ibid.* (12 Peters, 657, 726–7).

defects of the Confederation, he said, was that it created no judicial power without the action of Congress ; and yet, he says :

Defective as was the confederation in other respects, there was full power to settle controverted boundaries in the two cases, by an appeal by a state, or petition of one of its citizens.[1]

Urgent need of a judicial power to settle disputes.

This provision of the articles was not the result of an innovating spirit. The power was given, Mr. Justice Baldwin declares, 'from the universal conviction of its necessity, in order to preserve harmony among the confederated states, even during the pressure of the revolution. If, in this state of things, it was deemed indispensable to create a special judicial power, for the sole and express purpose of finally settling all disputes concerning boundary, arise how they might ; when this power was plenary, its judgement conclusive on the right ; while the other powers delegated to congress were mere shadowy forms, one conclusion at least is inevitable. That the constitution which emanated directly from the people, in conventions in the several states, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of confederation adopted by the mere legislative power of the states, had given to a special tribunal appointed by congress, where members were the mere creatures and representatives of state legislatures, appointed by men, without any action by the people of the state '.[2] In the more perfect Union, ordained, among other things, to establish justice, a permanent as distinct from a temporary court, says Mr. Justice Baldwin, 'exists by a direct grant from the people, of their judicial power ; it is exercised by their authority, as their agent selected by themselves, for the purposes specified ; the people of the states, as they respectively became parties to the constitution, gave to the judicial power of the United States, jurisdiction over themselves, controversies between states, between citizens of the same or different states, claiming lands under their conflicting grants, within disputed territory '.[3]

Still further speaking of this more perfect union, which was 'to operate in time of peace with foreign powers, when foreign pressure was not in itself some bond of union between the states, and danger from domestic sources might be imminent', the states submitted to the exercise of judicial power, 'waived,' as Mr. Justice Baldwin said, 'their sovereignty, and agreed to come to this Court to settle their controversies with each other, excepting none in terms. So they had agreed by the confederation ; not only not excepting, but in express terms including, all disputes and differences whatever '.[4]

On the question whether the Supreme Court could take jurisdiction of a controversy between states as to a boundary, that is to say, whether the Supreme Court could exercise rightfully jurisdiction over the parties and the subject-matter, Mr. Justice Baldwin, speaking for the Court, thus solemnly announced its conclusion respecting jurisdiction :

Function of the Court.

When, therefore, the court judicially inspects the articles of confederation, the preamble to the constitution, together with the surrender, by the states, of all power to settle their contested boundaries, with the express grant of original jurisdiction to this Court ; we feel not only authorized, but bound to declare, that it is capable of

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 728).
[2] *Ibid.* (12 Peters, 657, 728).
[3] *Ibid.* (12 Peters, 657, 728–9).
[4] *Ibid.* (12 Peters, 657, 730).

applying its judicial power, to this extent at least: 1. To act as the tribunal substituted by the constitution in place of that which existed at the time of its adoption, on the same controversies, and to a like effect. 2. As the substitute of the contending states, by their own grant, made in their most sovereign capacity, conferring that preexisting power, in relation to their own boundaries, which they had not surrendered to the legislative department; thus separating the exercise of political from judicial power, and defining each.[1]

Having decided that it could take jurisdiction of a boundary dispute, the Court next proceeds to consider the connexion between the boundary and sovereignty, that is to say, how the determination of the boundary necessarily carries with it the sovereignty of the State up to the limit and extent of the boundary. The bill presented the two questions: that the boundary line be ascertained and established by the Court; that the right of jurisdiction and sovereignty of the plaintiff to the disputed territory be restored and that it be quieted in the enjoyment thereof and its title thereto. The defendant considered the two questions as separate and distinct and that the question of sovereignty, being political, would necessarily prevent the assumption of jurisdiction. The Court, however, had no difficulty in showing that the ascertainment of the boundary determined the question of sovereignty, and it demonstrated, in a closely reasoned argument, that, although a question was political between nations, its submission to a court, to be determined by judicial methods in a judicial proceeding, made the question a judicial one.

The appeal in each case was made to the charters of the States and the boundary line between them was to be drawn in accordance with the provisions of the charters, from a point 'lyeing within a space of three Englishe myles on the south parte of the saide river called Charles River, or any or every parte thereof'. A line drawn east and west from this point, wherever found, was to be the southern boundary of Massachusetts and the northern boundary of Rhode Island. This was a mere question of fact, but a fact drawing with it immense consequences, thus stated by Mr. Justice Baldwin:

> The locality of that line is matter of fact, and, when ascertained, separates the territory of one from the other; for neither state can have any right beyond its territorial boundary.[2]

So much for the mere fact; next, as to the inevitable conclusions to be drawn from it. 'It follows', he continues, 'that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty are inseparable incidents, and remain so, till the state makes some cession.'[3] The learned Justice was not speaking without authority, for in the case of *United States* v. *Bevans* (3 Wheaton, 386) this very matter had been decided. To the question raised in that case, 'What then is the extent of jurisdiction which a state possesses?', Mr. Chief Justice Marshall, speaking for his brethren, said:

State jurisdiction and sovereignty depend upon boundaries.

> We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory, co-extensive with its legislative power. The place described, is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to (by) the United States.

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 731).
[2] *Ibid.* (12 Peters, 657, 733).
[3] *Ibid.* (12 Peters, 657, 733).

A little later in his opinion, that great and just judge, whose word is law to a continent, said :

A cession of territory is essentially a cession of jurisdiction.

And again :

Still the general jurisdiction over the place, subject to this grant of power (to the United States), adheres to the territory as a portion of sovereignty not yet given away.

Upon this, as a rock, Mr. Justice Baldwin stands, saying :

Title, jurisdiction, sovereignty, are therefore dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it ; so that great as questions of jurisdiction and sovereignty may be, they depend in this case on two simple facts. 1. Where is the southernmost point of Charles river ? 2. Where is the point, three English miles in a south line, drawn from it ? When these points are ascertained, which by the terms are those called for in both charters, then an east and west line from the second point, is necessarily the boundary between the two states, if the charters govern it.[1]

From this point of view, and it cannot be well controverted or gainsaid, it necessarily follows that the question is not more difficult, although it is vastly more important, than determining the boundary of an estate. The title deeds of the one would determine the place where the wall or the fence should be raised ; the charters of the other, the place where the invisible line separating two sovereign states should be drawn. The principle involved is the same, and the result is not different ; for the consequences of ownership follow in each case, although in one it be mere ownership and in the other it be jurisdiction, which is the essence of sovereignty. On this matter Mr. Justice Baldwin speaks some solemn truths which need to be said, but which will no doubt be unpalatable to those who see in the right of the State something different from the right of the individual, as if justice could differ according to the party possessing it. Therefore, Mr. Justice Baldwin's views on this important phase of the question will be quoted consecutively and without interruption :

If this Court can, in a case of original jurisdiction, where both parties appear, and the plaintiff rests his case on these facts, proceed to ascertain them ; there must be an end of this cause when they are ascertained, if the issue between them is upon original right by the charter boundaries. We think it does not require reason or precedent, to show that we may ascertain facts, with or without a jury, at our discretion, as the circuit courts, and all others do, in the ordinary course of equity : our power to examine the evidence in the cause, and thereby ascertain a fact, cannot depend on its effects, however important in their consequences. Whether the sovereignty of the United States, of a state, or the property of an individual, depends on the locality of a tree, a stone, or water-course ; whether the right depends on a charter, treaty, cession, compact, or a common deed ; the right is to territory great or small in extent, and power over it, either of government or private property ; the title of a state is sovereignty, full and absolute dominion ; 2 Peters, 300, 301 ; the title of an individual such as the state makes it by its grant and law.

The principles of ordinary litigation apply.

No court acts differently in deciding on boundary between states, than on lines between separate tracts of land : if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes, it is a case appropriate to equity.

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 733–4).

An issue at law is directed, a commission of boundary awarded ; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, province, or a state, is and shall be.

When no other matter affects a boundary, a decree settles it as having been by original right at the place decreed ; in the same manner as has been stated where it is settled by treaty or compact ; all dependent rights are settled when boundary is ; 1 Ves. sen. 448–50. If, heretofore, there was an issue in this case, on the locality of the point three miles south of the southernmost point of Charles river, we should be competent to decide it ; and decree where the boundary between the states was in 1629, and 1663, at the dates of their respective charters.

On these principles, it becomes unnecessary to decide on the remaining prayers of the bill ; if we grant the first, and settle boundary, the others follow ; and if the plaintiff obtains relief as to that, he wants no other. The established forms of such decrees extend to everything in manner or way necessary to the final establishment of the boundary, as the true line of right and power between the parties.[1]

The question of an agreement between the parties.

The learned Justice, however, stated that another element was present in the case, which, however, did not withdraw it from the power of the Court to grant an appropriate remedy if the facts constituting the cause of action were made out ; for, as previously stated, Massachusetts maintained in its plea in answer that the point in question had been determined by agreement of the parties in 1709, 1710, and 1718. Rhode Island, on the contrary, maintained that these agreements, if agreements they could be called, were concluded, in so far as Rhode Island was concerned, through the mistaken belief that a point thought to be three miles to the southernmost part of the Charles River, and therefore the point from which the boundary line should be drawn, was in reality six instead of three miles to the south, and that the mistake of this material fact vitiated the agreements and made them null, void, and of no effect. Thus circumstanced, the case presented, as Mr. Justice Baldwin said, '.a question of the most common and undoubted jurisdiction of a court of equity ; an agreement which the defendant sets up as conclusive to bar all relief, and the plaintiff asks to be declared void, on grounds of the most clear and appropriate cognizance in equity, and not cognizable in a court of law. A false representation made by one party, confided in by the other, as to a fact on which the whole cause depends ; the execution of the agreement, and all proceedings under it, founded on a mistaken belief of the truth of the fact represented.' [2]

As in the case of ascertaining the point and, in so doing, determining the boundary, so in the case of agreements based upon misrepresentation or the result of mistake. ' We must, therefore,' said Mr. Justice Baldwin, speaking for his brethren, ' do something in the cause ; unless the defendants have, in their objections, made out this to be an exception to the usual course of equity, in its action on questions of boundary.' [3] This the Commonwealth of Massachusetts attempted to do, by claiming that the question was political, as it involved sovereignty, and that, therefore, the Court was without jurisdiction to entertain or to decide the cause.

With this allegation the case enters upon a new and, indeed, its most important phase ; because, if the question was in fact political, the Court could not assume jurisdiction. Therefore, the sphere of usefulness of a supreme tribunal, especially one

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 734–5).
[2] *Ibid.*(12 Peters, 657, 735).
[3] *Ibid.* (12 Peters, 657, 735).

of the society of nations, would be doomed to operate within bounds unduly contracted, unless questions considered political could, in the future as in the past, be rescued from the faltering hands of diplomacy and, by submission to the Court, become judicial and be decided by the consent of the parties according to the principles of law and justice, like questions of humbler origin. The hope of the future is that law shall, little by little, win upon the political domain, making that legal or justiciable which was not so before, and continuing a process long since begun but never to be ended until, in the fine phrase of Mirabeau, Right shall one day be the monarch of the world. The opinion of Mr. Justice Baldwin offers a hope, and the Supreme Court the means of its realization ; it is in itself not merely a demonstration of the right of jurisdiction, since exercised by the Supreme Court in suits between states, but also a brief in behalf of a court of the society of nations which, like the Supreme Court of the United States, is to decide disputes alleged to be political, but in fact justiciable, between bodies politic, indifferently called states or nations ; and again, like the Supreme Court, to stand between diplomacy, non-existent or defective, on the one hand, and war, only too effective, on the other.

The learned Justice thus approaches the suggestion of a political question in the case :

It is said, that this is a political, not civil controversy between the parties ; and so not within the constitution, or thirteenth section of the judiciary act.

As it is viewed by the Court, it is on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles river ; which is the only question which can arise under the charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plain, by Woodward and Saffrey, in 1642, is the true point from which to run an east and west line, as the compact boundary between the states. In the first aspect of the case, it depends on a fact ; in the second, on the law of equity, whether the agreement is void or valid ; neither of which present a political controversy, but one of an ordinary judicial nature, of frequent occurrence in suits between individuals. This controversy, then, cannot be a political one, unless it becomes so by the effect of the settlement of the boundary ; by a decree on the fact, or the agreement ; or because the contest is between states as to political rights and power, unconnected with the original or compact boundary.[1]

The issue is of an ordinary judicial kind.

That is to say, a question solely one of fact, and therefore within the jurisdiction of a Court, would, if the contention of Massachusetts in the case be correct, become political because of the parties to it, and we would thus have justice, in the future as in the past, determined not by the essence of the thing but by the parties, the diamond depending, as it were, upon the setting, not upon its inherent virtue. But to Mr. Justice Baldwin :

We will not impute to the men who conducted the colonies at home, and in congress, in the three declarations of their rights, previous to the consummation of the revolution, from 1774, to 1776, and its final act, by a declaration of the rights of the states, then announced to the world ; an ignorance of the effects of territorial boundary between them, in both capacities. Every declaration of the old congress would be falsified, if the line of territory is held not to have been, from the first, the line of property and power. The congress, which, in 1777, framed and recommended the articles of confederation for adoption, by the legislative power of the several states ; were acting in a spirit of fatuity, if they thought that a final and conclusive

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 736).

judgment on state boundaries, was not equally decisive as to the exercise of political power by a state ; making it rightful within, but void beyond the adjudged line.

The members of the general and state conventions, were alike fatuitous, if they did not comprehend, and know the effect of the states submitting controversies between themselves, to judicial powers ; so were the members of the first congress of the constitution, if they could see and not know, read and not understand, its plain provisions, when many of them assisted in its frame.[1]

Mr. Justice Baldwin was unwilling to attribute to the revolutionary statesmen ignorance of their act and of its consequences, for he believed, and he showed, that they were making justiciable, questions hitherto political, which might arise between them in the future as they had in the past, and which, if not to be settled by diplomacy, must be settled by war. He believed that their experience with diplomacy was not such as to find in it the method of settling their disputes, and that their experience with war was such as to save them, their children, and their children's children from it if possible. Thus, he said :

The conversion of political into judicial questions.

The founders of our government could not but know, what has ever been and is familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political, and not judicial, as none but the sovereign can settle them. In the declaration of independence, the states assumed their equal station among the powers of the earth, and asserted, that they could of right do, what other independent states could do ; ' declare war, make peace, contract alliances ; ' of consequence, to settle their controversies with a foreign power, or among themselves, which no state, and no power could do for them. They did contract an alliance with France, in 1778 ; and with each other, in 1781 : the object of both was to defend and secure their asserted rights as states ; but they surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies ; thus making them judicial questions, whether they arose on ' boundary, jurisdiction or any other cause whatever '. There is neither the authority of law or reason for the position, that boundary between nations or states, is, in its nature, any more a political question, than any other subject on which they may contend. None can be settled without war or treaty, which is by political power ; but under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before. We are thus pointed to the true boundary line between political and judicial power, and questions. A sovereign decided by his own will, which is the supreme law within his own boundary ; 6 Peters, 714 ; 9 Peters, 748 ; a court, or judge, decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case ; 11 Ves. 294 ; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one to be decided by the sic volo, sic jubeo, of political power ; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power ; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.[2]

This analysis of the situation has the advantage of American practice and precedent, but the learned justice is unwilling to rest his case upon the limited experience

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 736).
[2] *Ibid.* (12 Peters, 657, 736–7).

of one country. He invokes a universal experience, a universal practice, a universal precedent, in behalf of what he believes to be a universal truth. Thus he says :

The analogy of the prize courts.

It has never been contended that prize courts of admiralty jurisdiction, or questions before them, are not strictly judicial ; they decide on questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted ; a fortiori, if such courts were constituted by a solemn treaty between the state under whose authority the capture was made, and the state whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property. 6 Cr. 284–5.[1]

These considerations lead to the definition of political and judicial power and questions ; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation ; 3 Ves. 429 : the latter is that which is granted to a court or judicial tribunal. So, of controversies between states ; they are in their nature political, when the sovereign or state reserves to itself the right of deciding on it ; makes it the ' subject of a treaty, to be settled as between states independent ', or ' the foundation of representations from state to state '. This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the equum et bonum of the case, let who or what be the parties before them. These are the definitions of law as made in the great Maryland case of *Barclay* v. *Russell*, 3 Ves. 435, as they have long been settled and established. Their correctness will be tested by a reference to the question of original boundary, as it ever has been, and yet is, by the constitution of England ; which was ours before the revolution, while colonies ; 8 Wheat. 588 ; as it was here from 1771 to 1781, thence to 1788, and since by the constitution as expounded by this Court.[2]

Mr. Justice Baldwin was a skilled advocate and a learned judge, but his advocacy and his learning were meant to persuade and convince, not to elicit a feeling of admiration or an idle compliment. His purpose was to show that what had unconsciously been done in the past could and should be consciously done in the future, the distinction between political and justiciable questions made clear, and a bridge, as it were, constructed, by means of which the nations might pass at their pleasure. But to return to the conclusion which the Justice inevitably drew from a series of simple but unanswerable premises.

The learned Justice here leaves the domain of general statement, and vouches the adjudged cases of English and American courts for the views which he has expressed, and for the definition and sphere of judicial power which he has laid down. He speaks of boundaries of contiguous pieces of land, of manors, of lordships or counties palatine, as cognizable in the court of chancery if they arose within the realm ; that a mere question of title to any defined part was cognizable by ejectment or real action in a court of law ; and that, in either case, such questions were judicial, to be settled in the court of chancery or court of law. If, however, the question arose beyond the boundaries of the kingdom, the king himself decided it as a political question, although it would be in nature the same as if it had arisen in the realm ; the only difference between them being that, in the latter case, the questions were judicial, whereas in the former they were political, because not yet submitted to the decision of a court of justice. As Mr. Justice Baldwin says :

The king had no jurisdiction over boundary, within the realm, without he had

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 736–7).
[2] *Ibid.* (12 Peters, 657, 737–8).

Jurisdiction of the English Crown,

it in all his dominions, as the absolute owner of the territory, from whom all title and power must flow, 1 Bl. Com. 241 ; Co. Litt. 1 ; Hob. 322 ; 7 D. C. D. 76 ; Cowp. 205–11 ; 7 Co. 17b, as the supreme legislator ; save a limited power in parliament. He could make and unmake boundaries, in any part of his dominions, except in proprietary provinces. He exercised this power by treaty, as in 1763, by limiting the colonies to the Mississippi, whose charters extended to the South sea ; by proclamation, which was a supreme law, as in Florida and Georgia, 12 Wheat. 524 ; 1 Laws U.S. 443–51 ; by order in council, as between Massachusetts and New Hampshire, cited in the argument. But in all cases, it was by his political power, which was competent to dismember royal, though it was not exercised on the chartered or proprietary, provinces. *Johnson* v. *McIntosh*, 8 Wheat. 580. In council, the king had no original judicial power, 1 Ves. sen. 447. He decided, on appeals from the colonial courts, settled boundaries, in virtue of his prerogative, where there was no agreement ; but if there is a disputed agreement, the king cannot decree on it, and therefore, the council remit it to be determined in another place, on the foot of the contract. 1 Ves. sen. 447. In virtue of his prerogative, where there was no agreement, 1 Ves. sen. 205, the king acts, not as a judge, but as the sovereign, acting by the advice of his counsel, the members whereof do not and cannot sit as judges. By the statute 20 E. 3, ch. I, it is declared, that ' the king hath delegated his whole judicial power to the judges, all matters of judicature according to the laws,' 1 Ruff. 246 ; 4 Co. Inst. 70, 74 ; he had, therefore, none to exercise : and judges, though members of council, did not sit in judicature, but merely as his advisers.[1]

It is impossible, it is believed, to find a more apt or felicitous illustration than that which the learned Justice has here used, for what the States of the American Union have done, and what the nations are recommended to do, the king himself, the source of justice, did, making of questions, which he himself decided according to his sense of right or wrong, judicial questions, to be decided by principles of justice, by submitting them to a court of justice, by divesting himself of judicial power vested in the sovereign or in the state, unless it has been vested in some agency or branch of the government. What the king did with a part of his power he may do with the rest ; what a state has done with a part of its power it may do with the rest ; what the nations have done with part of their power they may do with the rest of their judicial power. As the king vested it in a national court, as the States of the American Union vested it in a supreme court, the nations may vest it in a court of the society.

After a discussion of English cases, in which the settlement of boundary carried with it, as incident, title and jurisdiction, and after reference to cases in which sovereigns, not amenable to suit, came into courts of justice as plaintiffs or appeared as defendants, thus submitting the claims of sovereigns to law and to judicial process, and after showing that treaties between States and sovereigns became judicial by submission to courts where they were decided as judicial questions, the learned Justice thus proceeded a step further with his argument on this most important phase of the case :

which alone could adjudicate between the colonies.

In the colonies, there was no judicial tribunal which could settle boundaries between them ; for the court of one could not adjudicate on the rights of another, unless as a plaintiff. The only power to do it remained in the king, where there was no agreement ; and in chancery, where there was one, and the parties appeared : so that the question was partly political and partly judicial, and so remained till the declaration of independence. Then the states, being independent, reserved to them-

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 739).

selves the power of settling their own boundaries, which was necessarily a purely political matter, and so continued till 1781. Then the states delegated the whole power over controverted boundaries to congress, to appoint and its court to decide, as judges, and give a final sentence and judgment upon it, as a judicial question, settled by a specially appointed judicial power, as the substitute of the king in council, and the court of chancery, in a proper case ; before the one as a political, and the other, as a judicial question.

Effect of the Constitution.

Then came the constitution, which divided the power between the political and judicial departments, after incapacitating the states from settling their controversies upon any subject, by treaty, compact or agreement ; and completely reversed the long-established course of the laws of England. Compacts and agreements were referred to the political, controversies to the judicial power. This presents this part of the case in a very simple and plain aspect. All the states have transferred the decision of their controversies to this Court ; each had a right to demand of it the exercise of the power which they had made judicial by the confederation of 1781 and 1788 ; that we should do that which neither states or congress could do, settle the controversies between them. We should forget our high duty, to declare to litigant states that we had jurisdiction over judicial, but not the power to hear and determine political controversies, that boundary was of a political nature, and not a civil one ; and dismiss the plaintiff's bill from our records, without even giving it judicial consideration. We should equally forget the dictates of reason : the known rule drawn by fact and law ; that from the nature of a controversy between kings or states, it cannot be judicial ; that where they reserve to themselves the final decision, it is of necessity by their inherent political power ; not that which has been delegated to the judges, as matters of judicature, according to the law.[1]

Jurisdiction springs from agreement.

From the English cases it will be observed that the Court takes jurisdiction of cases in which there is an agreement ; that is, it takes jurisdiction of the agreement irrespective of the circumstances of the case, whereas it does not take jurisdiction of the circumstances unless there be an agreement. In the one case the question is judicial, in the other it is political. The agreement is the key to the difficulty. Because of agreement, the Court takes jurisdiction, because of the lack of it, political power. The learned Justice was therefore clearly correct in pointing out this distinction, and his great merit consists in applying to a vaster scale what was incontrovertible on the smaller. Disregarding the form for the substance, a compact between States gives a court jurisdiction and makes the questions involved judicial ; an absence of a compact leaves them as they were, the plaything of diplomacy and the cause or pretext of war.

Mr. Justice Baldwyn then takes up the American cases, similar in substance though not in form to the one under consideration, and shows that, as agreements in the English system, so compacts between States become judicial questions, and are submitted to and decided by the federal courts as such. When understood, the question is so simple, the process is so easy, that we are inclined to wonder why it was not announced before ; indeed, why it was not always so. Nothing is simpler, nothing is more universally recognized and admitted, that the interpretation and application of a written instrument is a judicial question. Its unconscious application is an argument in favour of it, and yet—it is the case over again of Columbus and the egg.

Precedents examined.

Mr. Justice Baldwin does not rest his case, however, upon the English cases. He appeals to the history of the Supreme Court for confirmation, although that Court

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 743–4).

had but a modest history and was just entering upon its great career. Thus, he said :

These rules and principles have been adopted by this court from a very early period.

In 1799, it was laid down, that though a state could not sue at law, for an incorporeal right, as that of sovereignty and jurisdiction ; there was no reason why a remedy could not be had in equity. That one state may file a bill against another, to be quieted as to the boundaries of disputed territory, and this Court might appoint commissioners to ascertain and report them ; since it is monstrous to talk of existing rights, without correspondent remedies. [*Fowler* v. *Lindsey*] 3 Dall. 413.[1]

This really is the case of *Rhode Island* v. *Massachusetts*, but Mr. Justice Baldwin could invoke greater authority for his views than the casual observations of Mr. Justice Washington, dropped in the course of an opinion. He could summon before him, as it were, the great Chief Justice Marshall, which he did—for the great of the world give their testimony by their acts, by their words and their deeds when they have left the world improved by their labours. Mr. Justice Baldwin therefore appeals to Chief Justice Marshall's opinion, saying that :

In *Cohens* v. *Virginia*, the Court held, that the judicial power of the United States must be capable of deciding any judicial question growing out of the constitution and laws. That in one class of cases, ' the character of the parties is everything, the nature of the case nothing ; ' in the other, ' the nature of the case is everything, the character of the parties nothing.' That the clause relating to cases in law or equity, arising under the constitution, laws and treaties, makes no exception in terms, nor regards ' the condition of the party '. If there be any exception, it is to be implied against the express words of the article. In the second class, ' the jurisdiction depends entirely on the character of the parties,' comprehending ' controversies between two or more states '. ' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.' 6 Wheat. 378, 384, 392–3.[2]

But the learned Justice is unwilling even to rest his case upon the authority of *Cohens* v. *Virginia*, and invokes other decisions of the Supreme Court, which he thus summarizes before their enumeration :

In the following cases it will appear, that the course of the Court on the subject of boundary, has been in accordance with all the foregoing rules ; let the question arise as it may, in a case of equity, or a case in law, of a civil or criminal nature ; and whether it affects the rights of individuals, of states, or the United States, and depends on charters, laws, treaties, compacts or cessions which relate to boundary.[3]

The case of *Robinson* v. *Campbell* (3 Wheaton, 213), decided in 1818, involved the construction of a compact and boundary between Virginia and North Carolina, made in 1802, and the decision turned upon the question whether the land in controversy was always within the original limits of Tennessee, which question the Court decided in the affirmative. The case of *United States* v. *Bevans* (3 Wheaton, 336), decided in 1818, was an indictment for murder, and the questions certified for the decision of the Supreme Court were whether the place in which the offence was committed was within the jurisdiction of Massachusetts, and, second, if so, whether it was committed within the jurisdiction of the Circuit Court of that district. The

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 744).
[2] *Ibid.* (12 Peters, 657, 744).
[3] *Ibid.* (12 Peters, 657, 744).

Supreme Court considered and decided the case as one of boundary. The case of *Burton's lessee* v. *Williams* (3 Wheaton, 529, 533, 538), decided in 1818, although a case between individuals, is very much in point, because it involved a conflict of interest between North Carolina, Tennessee, and the United States under cessions by North Carolina to Tennessee and the United States. In the course of its judgement the Court reviewed all the acts of Congress and of the two States on the subject, the motives and intent of the parties, in order to ascertain whether a *casus foederis* had arisen. The case also involved the construction of the compact between Tennessee and the United States, made in 1806. On this point, Mr. Justice Johnson, speaking for the Court, said :

> The members of the American family possess ample means of defence under the constitution, which we hope ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other, is taken away.

The learned Justice next takes up a series of cases, in which it is recognized that controversies between nations in the matter of boundary are political, but that an agreement, that is to say, a negotiation of a treaty or compact between them, transforms the political into a judicial question. Thus, in the case of *De la Croix* v. *Chamberlain* (12 Wheaton, 599, 600), decided in 1827, the Court held that :

> A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation. If the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties.

Treaties with foreign powers examined in the Supreme Court.

In the case of *Foster* v. *Neilson* (2 Peters, 253), decided in 1829, two questions arose : first, as to the boundary created by the treaty of 1803 between France and the United States ceding Louisiana to the latter, as to the boundary thereof before the cession of the Floridas by Spain to the United States in the treaty of 1819 ; second, as to the construction of the 8th article of that treaty. In this case, which is a leading one, the Court, per Mr. Chief Justice Marshall, held that, as long as the United States contested the boundary, it was to be settled by the two governments, not by the Court ; but that the agreement upon a boundary makes the question of boundary in its interpretation judicial, and in the course of his opinion Mr. Chief Justice Marshall declared a treaty, notwithstanding its form and solemnity, to be nothing more nor less than a contract. He also recognized it, in addition, to be a law of the land, as expressly declared by the Constitution, to be executed if it is complete in itself and does not require legislation to carry it into effect ; but if legislation is necessary, that it is a contract addressed to the political department to pass the legislation to carry it into effect. Thus, he says, in classic terms :

> Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself without the aid of a legislative provision. But when the terms of the stipulation import a contract ; when either of the parties stipulate to perform a particular act ; the treaty addresses itself to the political, not to the judicial department ; and the legislature must execute the contract, before it can become a rule for the Court.[1]

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 747).

In the case of *United States* v. *Arredondo* (6 Peters, 691, 710), decided in 1832, the principles laid down were reconsidered and affirmed, and, without discussing the facts of this very important case, it will suffice to say that the controversies between the United States and all persons claiming lands in Florida under grants from Spain, were submitted by act of Congress to the Supreme Court, prescribing, among other rules, the stipulations of treaties. Upon this case, thus imperfectly stated, Mr. Justice Baldwin remarks :

Thus acting under the authority delegated by congress, the Court held that the construction of the eighth article of the treaty of 1819, by its submission to judicial power, became a judicial question ; and on the fullest consideration, held, that it operated as a perfect, present, and absolute confirmation of all the grants which come within its provision. That no act of the political department remained to be done ; that it was an executed treaty, the law of the land, and a rule for the Court.[1]

In *United States* v. *Percheman* (7 Peters, 51, 89), decided in 1833, the Supreme Court was called upon to interpret article 8 of the treaty of 1819 between Spain and the United States, which it had considered in the case of *Foster* v. *Neilson.* The English text of that article imported the language of contract, that is to say, that the Spanish grants of land made before a certain date ' shall be ratified and confirmed to the persons in possession of the lands ' ; which, in the opinion of the Court, required an act of the legislature in order to ratify and confirm them, whereas the Spanish text of the same article, which was not then considered by the Court, but which was before it in the present case, stipulates that the grants ' shall remain ratified and confirmed to the persons in possession of them '. In the opinion of the Court this language could mean, and therefore was construed to mean, that they ' shall be ratified and confirmed by force of the instrument itself '. And because of this construction Mr. Justice Baldwin says that :

In the numerous cases which have arisen since, the treaty has been taken to be an executed one, a rule of title and property, and all questions arising under it to be judicial ; and congress has confirmed the action of the Court, whenever necessary.[2]

The last case cited by the learned Justice is clearly in point, and it is none other than that of *New Jersey* v. *New York,* which has already been considered in detail, in which, according to Mr. Justice Baldwin, ' the Court were unanimous in considering the disputed boundary between these states, to be within their original jurisdiction, and reaffirming the jurisdiction of the circuit courts, in cases between parties claiming lands under grants from different states : the only difference of opinion was on one point, suggested by one of the judges, whether as New York had not appeared, the Court would award compulsory process, or proceed *ex parte* ; a point which does not arise in this cause, and need not to be considered in its present state ; as Massachusetts has appeared and plead to the merits of the bill.' [3]

As the result of the American cases, reinforcing English precedent, Mr. Justice Baldwin feels justified thus to conclude, on behalf of the Court :

If judicial authority is competent to settle what is the line between judicial and political powers and questions, it appears from this view of the law, as administered in England and the courts of the United States, to have been done without any

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 747).
[2] *Ibid.* (12 Peters, 657, 747).
[3] *Ibid.* (12 Peters, 657, 747).

one decision to the contrary, from the time of Edward the Third. The statute referred to, operated like our constitution to make all questions judicial, which were submitted to judicial power, by the parliament of England, the people or legislature of these states, or congress: and when this has been done by the constitution, in reference to disputed boundaries, it would be a dead letter if we did not exercise it now, as this Court has done in the cases referred to.[1]

Calling attention to objections of a minor importance, which the Court brushed aside—such as that, by the Declaration of Independence, Massachusetts became an independent State and was not to be disturbed in the enjoyment of the territory whereof she was possessed; that the inhabitants of the disputed territory ought to be made parties to the bill, as their rights were affected; and that the Court could not proceed in the case without a prescribed process and rule of decision appropriate thereto—Mr. Justice Baldwin took up the last objection, that 'though the Court may render, they cannot execute a decree without an act of congress in aid'.[2] This, of course, presented a difficulty, but it was not insuperable in the mind of the Justice, and, following in the footsteps of his predecessors, he contented himself with general observations, leaving that bridge to be crossed when the parties reached it in the course of their case. Thus, he said:

The question of execution.

In testing this objection by the common law, there can be [no] difficulty in decreeing as in *Penn* v. *Baltimore*, mutatis mutandis. That the agreement is valid and binding between the parties; appointing commissioners to ascertain and mark the line therein designated; order their proceedings to be returned to the Court; 3 Dall. 412, note; decree that the parties should quietly hold according to the articles; that the citizens on each side of the line should be bound thereby, so far and no farther than the state could bind them by a compact, with the assent of Congress, 11 Peters 209; 1 Ves. sen. 455; 3 Ves. sen., Supplement by Belt. 195, 197. Or if any difficulty should occur, do as declared in 1 Ves. sen.; if the parties want anything more to be done, they must resort to another jurisdiction, which is appropriate to the cause of complaint, as the king's bench, or the king in council. Vide *United States* v. *Peters*, 5 Cranch 115, 135, case of Olmstead; make the decree without prejudice to the (United States,) or any persons whom the parties could not bind. And in case any persons should obstruct the execution of the agreement, the party to be at liberty, from time to time, to apply to the Court. 1 Ves. jr. 454; 3 Ves. sen. 195, 196. Or, as the only question is one of jurisdiction, which the court will not decide, they will retain the bill, and direct the parties to a forum proper to decide collateral questions. 1 Ves. sen. 204, 205; 2 Ves. sen. 356, 357; 1 Ves. sen. 454; 5 Cranch 115, 136. On the other hand, should the agreement not be held binding, the Court will decree the boundary to be ascertained agreeable to the charters, according to the altered circumstances of the case; by which the boundary being established, the rights of the parties will be adjudicated, and the party in whom it is adjudged may enforce it by the process appropriate to the case, civilly and criminally, according to the laws of the state, in which the act which violates the right is committed. In ordinary cases of boundary, the functions of a court of equity consists in settling it by a final decree, defining and confirming it when run. Exceptions, as they arise, must be acted on according to the circumstances.[3]

English practice to be followed.

Recognizing, however, that more than individuals were involved, that States were before the Court and to be bound by its decision, the learned Justice appreciated that coercion appropriate to the individual was not appropriate to the State. He therefore called attention to the fact that, 'in England, right will be administered

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 748).
[2] *Ibid.* (12 Peters, 657, 749).
[3] *Ibid.* (12 Peters, 657, 749–50).

to a subject against the king, as a matter of grace ; but not upon compulsion, not by writ, but petition to the chancellor (1 Bl. Com. 243).'

After the discussion of English practice, briefly summarized in the quotation, Mr. Justice Baldwin continues and thus concludes the opinion of the Court in this fundamental decision, which is as a landmark in the judicial settlement of international disputes :

Conclusions of the Court upholding jurisdiction.

The same principle was adopted by the eminent jurists of the revolution, in the ninth article of the confederation, declaring that the sentence of the court, in the cases provided for, should be final and conclusive, and with the other proceedings in the case, be transmitted to congress, and lodged among their acts, for the security of the parties concerned, nothing further being deemed necessary. The adoption of this principle, was indeed a necessary effect of the revolution which devolved on each state the prerogative of the king as he had held it in the colonies ; 4 Wheat. 651 ; 8 Wheat. 584, 588 ; and now holds it within the realm of England ; subject to the presumptions attached to it by the common law, which gave, and by which it must be exercised. This Court cannot presume that any state which holds prerogative rights for the good of its citizens, and by the constitution has agreed that those of any other state shall enjoy rights, privileges, and immunities in each, as its own do, would either do wrong, or deny right to a sister state or its citizens, or refuse to submit to those decrees of this Court, rendered pursuant to its own delegated authority ; when in a monarchy its fundamental law declares that such decree executes itself.[1]

Such is the decision of the Supreme Court of the United States on the question of jurisdiction involved in the liberally argued case of *Rhode Island* v. *Massachusetts* (12 Peters, 657), in which the Court, after prolonged deliberation and a proper sense of the importance of the case and an appreciation of its own responsibility in the premises, assumed jurisdiction ; and, as in the case of ordinary litigants before its bar, overruled the motion of the defendant. It is to be noted that Mr. Chief Justice Taney dissented on the ground that the case was political, not judicial, and that Mr. Justice Story, as a citizen of Massachusetts, took no part in the decision.

Dissenting opinion of Chief Justice Taney

In Mr. Chief Justice Taney's view the case was political, nor judicial, and because of that fact the Court should not take jurisdiction, inasmuch as to do so would not, in his opinion, be a proper exercise of the judicial power with which alone the tribunal over which he presided was vested. He briefly expressed his views, reserving the right to elaborate upon them at the final disposition of the case.

After analysing the bill of complaint in this case, Mr. Chief Justice Taney thus stated his conviction that the matter was political and that the Court should not, and indeed that it could not, accept jurisdiction :

on the ground that the case was political, not judicial.

It appears from this statement of the object of the bill, that Rhode Island claims no right of property in the soil of the territory in controversy. The title to the land is not in dispute between her and Massachusetts. The subject matter which Rhode Island seeks to recover from Massachusetts, in this suit, is ' sovereignty and jurisdiction ', up to the boundary line described in her bill. And she desires to establish this line as the true boundary between the states, for the purpose of showing that she is entitled to recover from Massachusetts the sovereignty and jurisdiction which Massachusetts now holds over the territory in question. Sovereignty and jurisdiction are not matters of property ; for the allegiance in the disputed territory cannot be a matter of property. Rhode Island, therefore, sues for political rights. They are the only matters in controversy, and the only things to be recovered ; and if she

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 751).

succeeds in this suit, she will recover political rights over the territory in question, which are now withheld from her by Massachusetts.

Contests for rights of sovereignty and jurisdiction between states over any particular territory, are not, in my judgment, the subjects of judicial cognizance and control, to be recovered and enforced in an ordinary suit ; and are, therefore, not within the grant of judicial power contained in the constitution.[1]

After referring to the opinion of Chief Justice Ellsworth in the case of *New York* v. *Connecticut* (4 Dallas, 4), decided in 1799, in which that learned judge said that a court of equity would not enter a decree in a matter of political jurisdiction, but only if a right of the soil were involved, and to the opinion of Chief Justice Marshall in delivering the opinion of the Court in *Cherokee Nation* v. *Georgia* (5 Peters, 20), decided in 1831, in support of his view that the Court could not and should not entertain a suit of a political character, as Mr. Chief Justice Marshall and the majority of the Court considered that case to be in part if not in its entirety, Mr. Chief Justice Taney continued and concluded :

In the case before the Court, we are called on to protect and enforce the ' mere political jurisdiction ' of Rhode Island ; and the bill of the complainant, in effect, asks us to ' control the legislature of Massachusetts, and to restrain the exercise of its physical force ', within the disputed territory. According to the opinions above referred to, these questions do not belong to the judicial department. This construction of the constitution is, in my judgment, the true one ; and I therefore think the proceedings in this case ought to be dismissed for want of jurisdiction.[2]

Mr. Justice Barbour held an intermediate position between that of the Chief Justice and the majority of the Court, stating that he concurred in the result, ' but he wished to be understood, as not adopting all the reasoning by which the Court had arrived at its conclusion.' [3]

11. State of Massachusetts v. State of Rhode Island.

(12 Peters, 755) 1838.

The matter of jurisdiction having been settled, and the case being on its pleadings before the Court, the next step would naturally be to set a day convenient to counsel and to the Court for the hearing of the case, which in this stage would be devoted to a consideration of the sufficiency of the pleadings ; but Massachusetts was apparently unwilling to proceed with the case to a final judgement, if it could be avoided. It had objected to the jurisdiction of the Court and, as will be seen, it took advantage of technical objections to the pleadings in order to prevent a hearing upon the merits and a decision in accordance with the case as made out ; and, in the interval between these two phases, construing to its advantage some expressions that fell from Mr. Justice Baldwin in the course of his opinion, that the voluntary appearance of Massachusetts was in itself a submission to the jurisdiction, and an admission on the part of the State of the jurisdiction of the Court. Mr. Webster, on behalf of Massachusetts, apparently willing to continue the case if he had to, but unwilling to prejudice his client by continuing if he could withdraw the appearance voluntarily entered, and thus leave his State in the condition it would have been had Massachu-

Desire of Massachusetts to avoid a final judgement.

[1] *State of Rhode Island* v. *State of Massachusetts* (12 Peters, 657, 753).
[2] *Ibid.* (12 Peters, 657, 754).
[3] *Ibid.* (12 Peters, 657, 754).

setts not appeared ; that is to say, with the plaintiff alone in Court, authorized to proceed *ex parte* if the Court should follow the precedents set in previous cases. He therefore moved for leave to withdraw the plea filed on the part of Massachusetts, and also the appearance of the State in the cause of action.

Application for leave to withdraw appearance.

Mr. Hazard, on behalf of Rhode Island, likewise sought to better the condition of his client, not by withdrawing its appearance, because that would be a dismissal of the case, but by amending the pleadings, owing to the discovery of some further proof of value to his State and in the light of the experience he had in the trial of the case. He moved, therefore, for leave to withdraw the general replication to the defendant's plea in bar and answer, and to amend the original bill—the result of which would enable Rhode Island to make, as it were, a restatement of its case, although still along the original lines.

Mr. Webster's motion was very adroitly framed and supported in argument, for he knew the importance of the point he had raised, and he must have felt the unwillingness of the Court to decide either that it had a right to compel the appearance of a State, or that it did not possess this right. For this question was squarely raised by the motion. It had to be met by the Court. It was met by the Court, and the decision then taken has since been adhered to. Mr. Webster's argument in support of his motion is thus stated, according to the official report :

Mr. Webster, in support of his motion, stated, that the governor of the state of Massachusetts had given him authority to represent the state ; and to have it determined by the Court, whether it had jurisdiction of the case. This authority is dated November 30th, 1833. It directs him to object to the jurisdiction, and to defend the cause. The appearance of Massachusetts was voluntary ; it was not intended, by the appearance, to admit the validity of the proceeding, or the regularity of the process. It was not supposed, that the state of Massachusetts would sustain any prejudice by this course. If the Court had no jurisdiction in the matter set out in the bill, the appearance of the state represented by him would not give it. It was thought most respectful to the Court, and proper in the cause, to file the plea with an intention to move the question of jurisdiction, at a subsequent time. Nothing has been done by the state of Massachusetts since ; and this Court has determined not to dismiss the bill of the complainants.

The Court has given an opinion in favour of their jurisdiction in the case. In the course of the argument, it appeared, that certain difficulties, which might have existed in the case, had been removed by the appearance and plea ; that jurisdiction was affirmed by the appearance and plea. It was said, if the question was on the bill only, the situation of the case might be different.

There is a great deal, from which it may be inferred, that if Massachusetts had stood out, contumaciously, there would be no authority in the Court to proceed against her in this case. But it was not for that state to stand off, and put the Court at defiance. If, then, the state, by considerations of respect ; if from a desire to have the question of jurisdiction settled, Massachusetts has appeared ; this Court will not permit advantage to be taken of such an act, induced by such motives, and for such a purpose.[1]

With this guarded and wary statement, most respectful for the dignity of the Court but solicitous for the rights of his client, Mr. Webster then stated in apt terms the desire of Massachusetts to withdraw its appearance, without, however, prejudicing the cause in case Massachusetts should decide not to avail itself of the permission, if permission should be given. He was apparently reluctant, perhaps unwilling, to

[1] *State of Massachusetts* v. *State of Rhode Island* (12 Peters, 755, 755–6).

withdraw ; yet, as we all recall incidents of our childhood, he would like to be coaxed to remain. Thus :

It is the desire of the counsel for the state of Massachusetts to withdraw the plea and appearance ; and to place the case in the same situation as it would have been, had there not been process. If a fair inference may be made, that the state has appeared to the process of the court, leave is asked to withdraw the appearance. It will be determined, hereafter, what course will be pursued by the state of Massachusetts.[1]

Motion opposed by Rhode Island.

Naturally, this state of affairs was embarrassing to counsel for Rhode Island, and only less annoying than the surprise experienced by the objection, made in open court, to the jurisdiction in the previous case, and the refusal of the counsel of Massachusetts, in that phase of the case and under those circumstances, to supply counsel for Rhode Island in writing with the grounds of their motion. Mr. Hazard was very anxious to prevent the withdrawal of the appearance. He was also unwilling to lose the advantage of the pleadings already on file in the Court ; and as this part of the case, like so many others, was one of first impression, he clung rather closely to the letter of the law in such matters, as its spirit would not advance the interests of his client. He insisted that, in suits between individuals, the appearance of the party was ' a waiver of all the errors of the proceeding ', and he cited a decision of the Supreme Court to the effect that the appearance of a party beyond the jurisdiction of the Court gave the Court the right to proceed.[2] Passing then to the immediate question, he said, according to the official report :

The authority given by the governor of the state of Massachusetts, which is on record in this case, is ample to all the purposes of this suit. It is an authority to appear and defend the case, and to object to the jurisdiction.[3]

This being so, he asked if the counsel could disappear, and, worst of all, could he carry the plea with him ? Thus :

Can the counsel of the state disappear ? If they do, they can carry nothing with them. The argument which was submitted to the Court, on the motion to dismiss this cause, precludes this. They can not disappear, and carry the plea with them.[4]

And he concludes with a technical objection to the effect that the two parts of which Mr. Webster's motion consists are contradictory, in that the withdrawal of the plea is consistent with the maintenance of the appearance, and the motion to withdraw the appearance amounts to a liberation from process after having appeared.

Mr. Southard also argued the point on behalf of Rhode Island, and, approaching the question from a standpoint somewhat different from Mr. Hazard's, re-enforced his contention, without, however, making it prevail. He clearly and accurately stated the question to be whether ' after appearance, plea, and answer ; the party can withdraw from the cause, and the cause stand as if no appearance had been entered '.[5] In order to show the position in which this would leave the case, and indeed to question the motives of Massachusetts, he recounted the proceedings already had and the steps which Massachusetts had successively taken. Thus, he said :

The appearance of the counsel for the state of Massachusetts, was general ; and it was followed by an application for a continuance, and for leave to plead,

[1] *State of Massachusetts* v. *State of Rhode Island* (12 Peters, 755, 756).
[2] *Ibid.* (12 Peters, 755, 756).
[3] *Ibid.* (12 Peters, 755, 756–7).
[4] *Ibid.* (12 Peters, 755, 757).
[5] *Ibid.* (12 Peters, 755, 757).

answer or demur. At the following term in January, 1835, a plea and answer were filed. At the January term, 1836, an agreement was made by the counsel in the cause, that the complainant should file a replication within six months. This was done; and in 1837 the application of one of the counsel for the complainant for a continuance was opposed, and was argued by the counsel for the state of Massachusetts. Thus the whole action of the counsel for the defendant was such as a party fully before the court would adopt and pursue. There was no question made as to the jurisdiction. The appearance was not followed by a motion to dismiss the bill on that ground; nor was the general appearance explained by its being followed by such a motion. After all these proceedings on behalf of the state of Massachusetts, and after the lapse of four years from the appearance of the state, by the authority of the governor, giving full power to counsel to act in the cause, a motion to dismiss the cause, for want of jurisdiction, was made by the state of Massachusetts, and was argued. This motion having failed, the Court are now asked to consider the case as if Massachusetts had not appeared; and as if process had not been issued in the cause.[1]

Like his colleague, he adverted to the procedure to be followed in suits between private parties, as there was as yet no direct ruling of the Court that the appearance of the State was voluntary, that it could not be compelled, and that, therefore, it might withdraw from the case at its pleasure; and as this phase of the case was of first impression, it is of interest also to state his reasoning in support of the contention. Thus:

It appears, that upon a statement of the case, no further reply to the application on the part of the state of Massachusetts is necessary. The purpose of it is to avoid the effect of the judgment of this court on the motion to dismiss the bill, to withdraw from the cause. This could not be done in a private case; and why should it be allowed in a case between states? The counsel seems to found his motion on something in the case, by which it would appear that if no appearance had been entered, the court would not have taken jurisdiction of the cause; and desires, therefore, to put herself in the situation he would have been in had he not appeared. Suppose, a demurrer to this jurisdiction had been put it, could the party, after the question had been argued, and decided against the demurrer, move to dismiss the case for want of jurisdiction. This was never heard of.

As Mr. Webster had made the motion, and as the counsel for the plaintiff had been heard, it was his right to close the argument, which he did as adroitly as he had begun it, and put the very question to the Court which it would have preferred not to decide, whether the appearance of a defendant is voluntary or whether it can be compelled; because, if voluntary, Massachusetts could withdraw a voluntary act, if compulsory, it could not. The question was squarely raised, and though very respectful in his language, Mr. Webster was very determined to have it settled, without, however, binding his State to any course of conduct. 'Is it considered', he asked, 'that this Court has a right to issue process against a state; and that it is the duty of the State to obey the process? If this is so, there is an end of the motion. But if the right of the Court to issue process is not determined, and yet the process has been issued, and the state of Massachusetts has come in, and has appeared; although there was no right to issue the process, the state should sustain no prejudice from having appeared for the purpose of having the question of jurisdiction settled. It is yet to be determined, whether the Court can issue process against a state; and Massachusetts is not to be entrapped by anything done by her, before this shall be

[1] *State of Massachusetts* v. *State of Rhode Island* (12 Peters, 755, 757–8).

decided. If the state of Massachusetts, from respect to the Court, has appeared, she asks the Court to say that there is a right to issue process against a state, and she will obey ; but if wrongfully issued, she asks that she shall not be affected by what she has done.' [1]

Leave to withdraw appearance granted by the Court.

The Court complied with Mr. Webster's request, and Mr. Justice Thompson delivered the opinion of the Court admitting his contention. After stating the nature of the motions before the Court, the learned Justice proceeded to say :

The motion, on the part of the state of Massachusetts, to withdraw the appearance heretofore entered, seems to be founded on what is supposed to have fallen from the Court at the present term, in the opinion delivered upon the question of jurisdiction in this case. It is thought that opinion is open to the inference that jurisdiction is assumed, in consequence of the defendant's having appeared in the cause. We did not mean to put the jurisdiction of the Court upon that ground. It was only intended to say, that the appearance of the state, superseded the necessity of considering the question whether any and what course would have been adopted by the Court, if the state had not appeared. We certainly did not mean to be understood, that the state had concluded herself on the ground that she had voluntarily appeared ; or that if she had not, we could not have assumed jurisdiction of the case. But being satisfied that we had jurisdiction of the subject matter of the bill, so far at least as respected the question of boundary, all inquiry as to the mode and manner in which the state was to be brought into Court, or what would be the course of proceeding if the state declined to appear, became entirely unnecessary. But as the question is now brought directly before us, it becomes necessary to dispose of it. We think, however, that the course of decision in this Court, does not leave us at liberty to consider this an open question.[2]

Mr. Justice Thompson then takes up the suits against states brought by individuals and states, and from their examination he comes to the conclusion that the question before the Court is not an open one, and that it has already been settled as a matter of practice. Inasmuch as this question is fundamental in suits between States of the American Union, and vital in suits between nations in the court of the society, the reasoning leading to this conclusion, which has done so much to remove the prejudice on the part of the States to the Court, and upon which it is believed the establishment of an international court of a like kind depends, will be rather fully stated, although it may seem to be in the nature of a repetition.

Precedents examined.

The first case to be considered was the second in the series of *New Jersey* v. *New York*, which the learned Justice thus analysed :

In the case of the *State of New Jersey* v. *State of New York*, 5 Peters, 287, this question was very fully examined by the Court, and the course of practice considered as settled by the former decisions of the Court, both before and after the amendment of the constitution ; which declared, that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against a state, by citizens of another state, or subjects of any foreign state. This amendment did not affect suits by a state against another state ; and the mode of proceeding in such suits, was not at all affected by that amendment.[3]

After showing that the decision of that case, delivered by Mr. Chief Justice Marshall, it may be said in passing, followed the precedents already made in such

[1] *State of Massachusetts* v. *State of Rhode Island* (12 Peters, 755, 758–9).
[2] *Ibid.* (12 Peters, 755, 759).
[3] *Ibid.* (12 Peters, 755, 759–60).

matters, he pointed out wherein the case was an advance upon its predecessors, saying :

And the Court went a step farther, and declared what would be the course of proceeding in a stage of the cause, beyond which former decisions had not found it necessary to prescribe such course.

The Court, in the case of *New Jersey* v. *New York*, commence the opinion, by saying : ' This is a bill filed for the purpose of ascertaining and settling the boundary between the two states.' And this is precisely the question presented in the bill now before us. And it is added, that congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state.

The precise question was, therefore, presented, whether the existing legislation of congress was sufficient to enable the court to proceed in such a case ; without any special legislation for that purpose. And the Court observed, that at a very early period of our judicial history ; suits were instituted in this Court, against states ; and the questions concerning its jurisdiction were necessarily considered.[1]

The learned Justice here draws and states the results of the early cases, so that, re-enforced by their authority, as far as it went, the Court might take, as it did, the next step, and decide the very question which it believed these cases involved, but which had not been expressed in clear and unmistakable terms, because it was not then necessary to do so. Thus, the learned Justice continued :

An examination of the acts of congress, in relation to process and proceedings, and the power of the Court to make and establish all necessary rules for conducting business in the Courts, is gone into, and considered sufficient to authorize process and proceedings against a state ; and the Court adopted the practice prescribed in the case of *Grayson* v. *The Commonwealth of Virginia*, 3 Dall. 320, that when process in common law or in equity shall issue against a state, it shall be served on the governor, or chief executive magistrate, and the attorney general of the state. The Court, in that case, declined issuing a distringas, to compel the appearance of the state ; and ordered, as a general rule, that if the defendant, on service of the subpoena, shall not appear at the return day therein, the complainant shall be at liberty to proceed ex parte.[2]

The learned Justice then stated, in the following passage, that the practice laid down in this case, which specifically refused, upon request of counsel, to compel appearance, ' has since been to proceed ex parte, if the state does not appear. And accordingly, in several cases, on the return of the process, orders have been entered, that unless the state appear by a given day, judgement by default will be entered. And further proceedings have been had in the causes. In the case of *Chisholm's Executors* v. *The State of Georgia*, 2 Dall. 419, judgement by default was entered, and a writ of inquiry awarded in February term 1794. But the amendment of the constitution prevented its being executed. And in other cases, commissions have been taken out for the examination of witnesses '.[3]

After this statement, by way of introduction, the learned Justice next states the practice, as he supposes it to be at the date of the case in hand, in order to have the decision which he is to announce on behalf of the Court appear to rest upon and to spring out of these precedents, however meagre they may seem to us to-day.

By such proceedings, therefore, showing progressive steps in cases towards a final hearing, and in accordance with this course of practice ; the Court, in the case

[1] *State of Massachusetts* v. *State of Rhode Island* (12 Peters, 755, 760).
[2] *Ibid.* (12 Peters, 755, 760). [3] *Ibid.* (12 Peters, 755, 760–1).

of *New Jersey* v. *New York*, adopted the course prescribed by the general order made in the case of *Grayson* v. *The Commonwealth of Virginia* ; and entered a rule, that the subpoena having been returned, executed sixty days before the return day thereof, and the defendant having failed to appear, it is decreed and ordered, that the complainant be at liberty to proceed ex parte ; and that, unless the defendant, on being served with a copy of this decree, shall appear and answer the bill of the complainant, the Court will proceed to hear the cause on the part of the complainant, and decree on the matter of the said bill.

Coercive process not to be taken against States.

So that the practice seems to be well settled, that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measure will be taken to compel appearance ; but the complainant, or plaintiff, will be allowed to proceed ex parte.[1]

With the solemn determination of the Court that coercive measures would not be taken to compel the appearance of a state by force, it necessarily followed that the counsel of Massachusetts could come or go as he pleased. But the Court evidently had the feeling that states, like individuals, are often so pleased with the recognition of a right that they fail to exercise it, and that it was not to be expected that Massachusetts would, upon reflection, withdraw from the case. Therefore, in the concluding passage of the opinion, Mr. Justice Thompson contemplated the procedure to be followed if Massachusetts did not withdraw, thereby making it easier for the State whose *amour propre* had been soothed to remain in Court. Thus he said :

> If, upon this view of the case, the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given ; and the state of Rhode Island may proceed ex parte. And if the appearance is not withdrawn, as no testimony has been taken, we shall allow the parties to withdraw or amend the pleadings ; under such order as the court shall hereafter make.[2]

It may be noted that Mr. Justice Baldwin dissented, without, however, stating the grounds of his dissent, and that Mr. Justice Story did not sit in the case.

12. State of Rhode Island v. State of Massachusetts.

(13 Peters, 23) 1839

Hesitation of Massachusetts.

As so often happens, there was a lull after the storm. Massachusetts was not quite sure of the course it was to pursue. Mr. Webster was in doubt as to his right to appear, as he did not consider himself authorized further to represent the State. As, however, Rhode Island had a right, under the practice of the Court, and indeed by its express permission in this case, to proceed *ex parte* if Massachusetts withdrew its appearance, Mr. Webster evidently thought it unsafe to allow the little State to have its own way ; and that it was to the interest of Massachusetts to keep in touch with counsel for the plaintiff. He therefore appeared, apparently representing himself.

The official report of the case, however, does not leave us in doubt as to the reason for Mr. Webster's actions, and it does not require any great degree of imagination to divine his motives. If, however, we should be in doubt, the opening sentence

[1] *State of Massachusetts* v. *State of Rhode Island* (12 Peters, 755, 761).
[2] *Ibid.* (12 Peters, 755, 761).

of the official report of this phase of the case is of the nature to clear it up. Thus, Mr. Southard, for the complainants, stated :

Application by Rhode Island to expedite the case.

that the state of Rhode Island, with the consent of the Court, obtained at last term, had amended the bill filed in this case ; and he moved the court for a rule on the state of Massachusetts to answer within a short time, so that the case might be disposed of during the term.[1]

Perhaps Mr. Southerd's directness of expression was designed to call Mr. Webster to his feet—who had done little more than stray into the Court—and if so it succeeded, because, to quote the language of the report :

Mr. Webster stated, that, although not authorized to appear in the case, he thought it proper to say that the opinions of the Court delivered at the last term in this cause had been submitted to the government of Massachusetts. It was a short time before the adjournment of the legislature of the state that they were communicated to them. The subject will be again presented by the governor to the legislature, at the session now held ; and it is expected, that some action upon it will take place. In the posture in which the case stood at the last term of this Court, the attorney general of the state of Massachusetts has not thought it proper to do anything. The movements of such bodies, as the defendants in this case, are slow.[2]

Taking advantage of this turn of affairs, which had no doubt been anticipated, Mr. Hazard expressed a willingness to have Massachusetts answer ; but, coming from a very small State, indeed, the smallest State of the American Union, whose smallness was due, as he alleged, in part to the action of Massachusetts, he was not as impressed with the slowness of movement, although he may have been by the majesty, of the State of Massachusetts. He therefore stated that he had no objection to an allowance of time for the defendants to answer, but, to quote the language of the official report, ' he did not think that the slow movements of such bodies should be allowed, when other parties are concerned '. He therefore, somewhat unfeelingly, as Mr. Webster might have said, asked that a time for the filing of an answer by the state of Massachusetts ' be definitely fixed '.

Decision of the Court granting further time to Massachusetts.

On this state of affairs Mr. Chief Justice Taney delivered the judgement of the Court, allowing Massachusetts time within which to determine whether it would withdraw its appearance or answer the amended bill of the plaintiff, overruling the motion of the complainant that the answer be filed at such time as to enable the case to be heard and determined in the present term of the Court, but setting a date when the answer, if Massachusetts was minded to answer, should be presented, and the case made ready for the next step forward. This date was the next term of Court.

In his opinion Mr. Chief Justice Taney calls attention to the fact that, although permission had been given to the complainant at the last term of Court to file an amended bill, the amended bill had only been filed on the second day of the present term, that the defendant could not have answered it, and that it was not and could not be in default. The one question, therefore, for the Court to determine was the time to be given to the defendant, and on this point the learned Chief Justice said :

From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern Courts of Equity in suits between individuals. In the last mentioned cases,

[1] *State of Rhode Island* v. *State of Massachusetts* (13 Peters, 23).
[2] *Ibid.* (13 Peters, 23).

The Court will allow more time to States than to private parties.

the material allegations in the bill are comparatively few in number, and rest in the personal knowledge of the individual who is to put in his answer. But a case like this, and one too of so many years standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual. Agents must be employed, and much time may be required to search for historical documents, and to arrange and collate them, for the purpose of presenting to the court the true grounds of the defence. It is impossible for the Court to foresee, what additional inquiries and explanations may be found necessary, in consequence of the new allegations and documents introduced into the bill; and the new interrogatories as to the verity of various papers stated in the bill, which the defendant is now called upon to answer. And as the Court have received the amendment of the complainant, at the present term, upon the leave granted at the last term, as here in before mentioned; we think, that the same time should be given to the defendant to answer.[1]

The decision of the Court in this phase of the case and the reasons advanced by the Chief Justice for the action taken preclude comment, other than to note the distinction which the Court draws, even in a purely formal matter, between the rules affecting private persons and the rules affecting States. And without further dwelling upon this characteristic, it may be said, in this connexion, that a careful reading of all the cases in which a State has been a party shows that justice to the State is the leading, if not the sole preoccupation of the Court, and that the rules of private suitors, applicable in the main, are varied to suit the convenience of each of the august parties whenever a request is made to the Court with which it can properly comply.

13. State of Rhode Island v. State of Massachusetts.

(14 Peters, 210) 1840.

Questions of pleading.

The sixth phase of this long-drawn-out litigation deals with questions of pleading, as does the seventh, in order to reduce the case to an issue affirmed by the plaintiff and denied by the defendant, so that the case might be taken up and decided upon its merits, as it was in the eighth and final phase. To the layman, pleadings are in the nature of mysteries, and betimes they are not over-clear to counsel, if we are to judge by the procedure in this very case. And yet the purpose of pleading is to eliminate extraneous matter and to concentrate attention upon the issue, in order that it may be considered by counsel and decided by the Court. The pleadings, however, are not ends in themselves, they are means to the proper and lawful disposition of the case. In so far as they serve this purpose they are acceptable; in so far as they do not they are to be rejected. The systems of common law and equity pleading in England, adopted by the young Republic, have had their day, and the complicated procedure which was the prerogative and, one might almost say, the patrimony of a professional class, has been simplified even in England, and in the States of the American Union it has fought a losing battle. The technicalities guide counsel but do not control the Court in its administration of justice. In the same way the technicalities of the past have given way to the spirit of the day in federal practice and procedure, and only yesterday the Supreme Court of the States promulgated rules of Equity practice for Courts of the United States, superseding the rules

[1] *State of Rhode Island* v. *State of Massachusetts* (13 Peters, 23, 24).

heretofore existing, and allowing justice in the future to be directly administered, instead of indirectly by amendment of the pleadings at the expense of the litigants. In suits between States, however, it is to be borne in mind that the Court has invariably brushed aside the technicalities standing in the way of the States and while following has modified the rules of chancery, so that, in every instance, the claim of the complainant and the defence of the defendants could be presented, aided but not embarrassed by technicalities, in order to reach a decision of the case on the merits.

Therefore, although the two phases of the case of *Rhode Island* v. *Massachusetts*, now to be considered, bristle with demurrer and plea, answer, and replication, the rules of Equity pleading did not pervert, although they may have delayed, justice.[1] The system, as such, no longer prevails in equity suits, whether between states or private parties, and it can only have an historical interest in view of the 29th of the rules of practice, promulgated by the Supreme Court on November 4, 1912, the text of which is thus worded (p. 8) :

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer ; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

It would, however, be unjust, as tending to create a wrong impression, if it were not said in this connexion that the Supreme Court had so fashioned the rules of equity pleading as to give the States in substance, if not in form, the advantages of the simplified procedure in every case.

It is to be observed, in taking up the first phase of the matter of pleading, that counsel for Rhode Island had been given leave to withdraw their replication to the defendant's answer and plea in bar, and to file an amended bill, which they did ; and that counsel for Massachusetts had been given the option of withdrawing appearance or of presenting an appropriate reply to the amended bill. Massachusetts did not withdraw its appearance, satisfied, apparently, with the declaration of the right in its favour ; but, convinced that it was in its interest to continue the litigation, it presented to the amended bill a plea and answer, as the official report says, 'the same in all important particulars, as that originally filed at January term, 1834.'[2]

[1] The extent to which the practice and procedure in chancery obtained in the conduct, as well as in the decision, of a controversy between States is shown by the following passage :

'Before the argument was proceeded in, a question arose between the counsel in the case, on the right of the counsel for the complainants to begin and conclude the argument.

'The Court held, that by a rule of the Court, the practice of the English Courts of Chancery is the practice in the Courts of Equity of the United States. On looking into the books of practice in the English Courts of Chancery it appears that the party who puts in the plea which is the subject of discussion, has the right to begin and conclude the argument. The same rule should prevail in the Courts of the United States in Chancery proceedings. (*State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 216).)

[2] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 216).

This phase of the case, therefore, can be considered as heard upon the complainant's amended bill, the plea and answer of the defendant. From the standpoint of procedure it is not necessary to dwell upon the details of the pleadings, inasmuch as the reasons which caused the Court to overrule the plea and answer of Massachusetts are briefly but sufficiently stated in the opinion of Mr. Chief Justice Taney in behalf of the court. After stating that Massachusetts had made its election by putting in a plea to the amended bill of the plaintiff, and that both parties were now regularly before the court, Mr. Chief Justice Taney, within the compass of a paragraph, stated the present situation of the case, the nature of the suit, and the objects alike of plaintiff and defendant :

> In the present stage of the case, the question is upon the sufficiency of the plea, as a bar to the relief sought by the complainant's bill. The object of the bill is to establish the boundary between the two states, according to their respective charters ; and to be restored to the right of jurisdiction and sovereignty over that portion of her territory of which she alleges that Massachusetts has unjustly deprived her.[1]

After an elaborate statement of the plaintiff's bill and of the defendant's plea and answer, important to counsel charged with the interests of their clients but not of interest to the reader, whose main purpose is to see how tenderly, if the expression may be permitted, the Court considered the parties before it, and moulded a procedure in the interest of both consistent with the dignity of litigating States. The court considered whether, given the technical form and effect of the pleadings, the State of Rhode Island would be prejudiced in the prosecution of the case if the plea was sustained, as Massachusetts contended it should be, and as Rhode Island insisted it should be overruled. By joining issue on the plea, the complainant admits the truth of the facts, pleaded in bar of the action stated in the plea, and eliminates from consideration the additional and inconsistent facts set up in the original bill. By the plea, therefore, the defendant sets forth a phase of the case which, in his opinion, is a bar to the action, and if the court sustains the sufficiency of the plea it enters judgement for the defendant. This, however, was strict equity pleading, which, in appropriate cases, was varied by allowing the complainant to amend his bill at his own cost and to the prejudice, it may be, of his case. The court was of the opinion, as will be seen, that to limit Rhode Island to the defence set forth in the plea would be to decide the case on that portion of it favourable to Massachusetts, to the exclusion of that portion of it favourable to Rhode Island. This it was unwilling to do.

So much for the substance of the plea. In the next place, the court believed that the plea was defective in form, in that it presented for consideration two defences, whereas the purpose of the plea is to shorten the proceedings, by a presentation of many views, it may be, but one defence, leaving to the defendant the right to proceed by an answer, if he wishes to present more than a single defence. Finding that the plea contained two defences, and that each defence was inconsistent with the other, it was alike in the interest of the complainant and the defendant to have the pleadings amended, so that the case in its entirety should be before the court for decision according to its merits. It was, therefore, in the interest of both States that the pleading should be amended lest they should stand in the way of justice.

[1] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 251–2).

The portions of the opinion of the court necessary to an understanding of this phase of the case will therefore be considered, and, in as far as possible, in the words of its spokesman. Thus, Mr. Chief Justice Taney says :

The complainant insists in her bill, that Massachusetts has encroached upon her ; and instead of coming three miles south of Charles river for the southern line the one to which she claims and holds is more than seven. The defendant, it will be observed, does not, in her plea, deny that the charter line of Massachusetts is such as the complainant describes ; nor does the defendant deny, that the line to which Massachusetts now holds, and to which she insists that she has a right to hold, is four miles further south than that described in the charter ; but she relies upon the circumstances set forth in her plea and answer, as conclusive proofs of her right, as against the complainant, at this time, whatever may have been the true boundary line between them according to the terms of the original charters.[1]

Freed from technicalities, this means that, under the plea, the boundary line under the charters is eliminated and the boundary line then held by Massachusetts becomes the material issue which, by joining in the plea, Rhode Island is forced to admit. The impropriety of holding Rhode Island to this technical rule of equity pleading is thus pointed out by the Chief Justice :

The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a Court of justice ; and we have no precedents to guide us in the forms and modes of proceedings, by which a controversy of this description can, most conveniently, and with justice to the parties, be brought to a final hearing. The subject was, however, fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion, the court determined to frame their proceedings according to those which had been adopted in the English Courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded, is fully stated in the opinion then delivered ; and upon re-examining the subject, we are quite satisfied as to the correctness of this decision. 12 Peters, 735, 739.[2]

The Court will follow the English Chancery rules,

It is to be taken, therefore, as the solemn and measured conclusion of the Court, that the rules of Chancery practice were to obtain in controversies between states ; but only on condition that they permitted absolute justice to be done. Thus :

The proceedings in this case will therefore be regulated by the rules and usages of the Court of Chancery. Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the Court, to mould the rules of Chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned are too great, to be decided upon the mere technical principles of Chancery pleading. And if it appears that the plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of her claim, on which she relies, the case ought not to be disposed of on such an issue. Undoubtedly the defendant must have the full benefit of the defense which the plea discloses ; but at the same time the proceedings ought to be so ordered as to give the complainant a full hearing upon the whole of her case. In ordinary cases between individuals, the Court of

subject to any necessary modifications.

[1] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 256).
[2] *Ibid.* (14 Peters, 210, 256–7).

Chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength.[1]

Having laid down the general principle to be followed in such cases, the Chief Justice then proceeds to point out particulars in which the plea would, if accepted, prevent Rhode Island from unfolding its entire case for the decision of the Court. Thus :

Chancery practice explained.

According to the rules of pleading in the Chancery Court, if the plea is unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea. If he elects to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea, and merely denies their sufficiency, in point of law to prevent his recovery. If, on the other hand, he replies to the plea, and denies the truth of the facts therein stated, he then admits that if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery : and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. 6 Wheat. 472. Undoubtedly, if a plea, upon argument is ruled to be sufficient in law to bar the recovery of the complainant, the Court of Chancery would, according to its uniform practice, allow him to amend ; and to put in issue, by a proper replication, the truth of the facts stated in the plea. But in either case, the controversy would turn altogether upon the facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of these rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the Court of Chancery in relation to pleas. In many cases, where they are not overruled, the Court will not permit them to have the full effect of a plea ; and will in some cases save the defendant the benefit of it after the hearing ; and in others, will order it to stand for an answer as in the judgment of the Court may best subserve the purposes of justice.[2]

The consequences of either action on the part of Rhode Island are thus succinctly stated by the Chief Justice :

In the opinion of this Court, it was evident from the argument we have heard, that if the plea stands, the case must be finally disposed of, upon an issue, highly disadvantageous to Rhode Island. For by setting down the plea for argument, the state is compelled to admit the truth of all the facts stated in it, many of which are directly at variance with the allegations contained in the bill.[3]

As examples of this the Court refers to the allegation of Massachusetts that the commissioners drafting the agreement of 1719 had authority so to do, which Rhode Island denied ; that the bill states the agreement was made under a mistaken belief that the Woodward and Saffrey stake was only three miles from the southernmost part of the Charles River, whereas in fact it was seven miles to the south ; whereas the plea insists that the agreement or terms of 1719 was signed in the fullness of knowledge, and that the doctrine of mistake could not be invoked.

In two paragraphs, interesting in themselves, and important as showing the attitude of the Court, which almost makes of it counsel for the States in controversies

[1] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 257).
[2] *Ibid.* (14 Peters, 210, 257–8).
[3] *Ibid.* (14 Peters, 210, 258).

between them, the Chief Justice elaborates on the disadvantages accruing to Rhode Island, if it sets the plea down for argument or if it answers it. Thus:

Strict technicality would be unjust to Rhode Island.

If we proceed to decide the case upon the plea, we must assume, without any proof on either side, that the facts above mentioned are correctly stated in the plea and incorrectly set forth in the bill. This is the rule of the Chancery law. Yet it is evident, that by deciding the case upon such an issue, we should shut out the very gist of the complainant's case; and exclude the facts upon which her whole equity is founded, if she has any. Because, if we assume, as we must do in this state of the pleading, that the agreements, which are admitted on both sides to have been made, were made by persons having competent authority to make them, and who had full knowledge of all the circumstances; and that Massachusetts had quietly and peaceably enjoyed the territory, under the agreement, for more than a century; every one, we presume, would admit that the claim of Rhode Island to unsettle this boundary, at this late date, was utterly groundless and untenable. Yet this is the attitude in which Rhode Island must stand, upon the issue framed by the plea; the allegations in her bill, above mentioned, must be rejected as erroneous, without giving her an opportunity of proving them; and her claim of this territory must be decided, upon a statement of facts, the truth of which she utterly denies, and which she offers to prove are entirely erroneous, if the Court will consent to hear her testimony. We do not mean to say that the facts stated in the bill, if proved to be true, will entitle the complainant to recovery. That point is not before us in the present state of the pleadings; and we give no opinion on the merits of this controversy. But certainly it would be unjust to the complainant not to give her an opportunity of being heard, according to the real state of the case between the parties; and to shut out from consideration the very facts upon which she relies to maintain her suit.

If the complainant takes issue on the facts stated in the plea, her condition would be equally unfavorable. For there are many facts upon which the complainant evidently relies as material, which are altogether unnoticed in the plea, and upon which, therefore, no issue will be framed. And if the complainant were to adopt this alternative, she would admit, according to the Chancery rules of pleading, that all of the allegations, contained in her bill were immaterial and of no importance, except those noticed in the plea; and that if the facts averred in the plea turned out to be true, the complainant had no right to recover, whatever equities might be found in the other allegations in the bill; and whatever proofs she might be ready to adduce in support of these allegations.

In either alternative, therefore, it would be manifestly unjust to the complainant, to decide this controversy upon the plea; and if it was deemed good in form and substance, so far as the case is already presented to the Court, we still should not finally decide the controversy on this plea, but save the benefit of it to the hearing, and give the complainant as well as the defendant, the opportunity of bringing forth all the merits of his case.[1]

The second objection to the plea is, as already stated, that instead of confining itself, as required by the rules of technical pleading in such matters, to a single defence, it puts in issue two defences, which would be proper in an answer but improper in a plea. In this short cut, the complainant has a right to have the defendant point out the one issue and to rely upon it as decisive of the case, if he prefer to plead rather than to answer. On this phase of the subject, although it has but an historical interest, the decision of the Court will be considered as showing its solicitude for the rights of the states. And it is only fair to say, in passing, that a better example of this could not possibly be chosen from the annals of the Supreme Court than this very case and this very opinion by Chief Justice Taney, who opposed the assumption

[1] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 258–9).

of jurisdiction in this case, and who, it will be seen, repeated his views in his final decision.

The two defences militating against the plea are, first, that it sets up an accord and compromise of the then colonies in the proceedings, running from 1709 to 1719; second, that it sets up continuous possession of the boundary as claimed not merely from the accord and compromise, but also from a date anterior to the charter of Rhode Island to the day of the hearing. It is evident that these defences are inconsistent, because, if the compromise is good, possession is immaterial, and if Massachusetts has title by prescription, the necessity of the compromise is eliminated. Either is sufficient, but neither can be regarded as surplusage, as each is separate and distinct and goes to a different phase of the case. Of this phase of the subject Mr. Chief Justice Taney says:

The defence set up by this plea is twofold: 1. That there was an accord and compromise of a disputed right. 2. Prescription, or an unmolested possession from the time of the agreement, that is, of more than one hundred years. These two defences are entirely distinct, and depend upon different principles. If what the defendant alleges be true, then the agreements themselves conclude the controversy. For if, as the plea avers, there was a dispute between these two colonies, in respect of the boundary between them, and that dispute was settled by persons duly authorized to bind the respective parties; and if, as stated by the plea, the agreement of October 1718, to run the line from the stake set up by Woodward and Saffrey, was accepted, ratified and confirmed by Rhode Island; and if the running of the line afterwards in 1719, pursuant to such agreement, was also approved by Rhode Island; then there can no longer be any controversy between them. They must, on both sides, be bound by the accord and compromise of those whom they had authorized to bind them, and whose conduct they afterwards approved; provided the settlement was made, as the plea alleges, with a full and equal knowledge of all the circumstances. The various facts stated by the defendant, in relation to these agreements, contribute to support them, and conduce to establish this point of his defence. And, assuming that the plea and answer are true in all these statements, then an accord and compromise is established, which was obligatory upon the parties from the moment it was finally ratified. And taking everything averred by the defendant on this point of the defence to be correct, Rhode Island would have been as effectually barred as she is at the present moment, if she had commenced this controversy within a month after the accord was made. The lapse of time is not at all necessary to give validity to such a settlement or to support the defence founded upon it. It is a matter entirely distinct from it; and if it had any operation in the case, it is another defence, and one of a different character. It is not an accord and compromise of a doubtful right—it is prescription.[1]

So much for the first phase of this question. With regard to the matter of prescription, just stated by the Chief Justice to be inconsistent with the plea of compromise, he thus says, speaking again, as always, for the court:

Rhode Island, indeed, avers, that the possession was constantly disputed on her part, and efforts made from time to time to regain it; and that it has always been an open question, since the error in the line was first discovered, down to the present time. But, as we have already remarked, when the plea is set down for argument, the statements contained in it are admitted to be true. And according to the allegations there made, this long possession was unmolested. In that state of the fact, separation from all the averments of Rhode Island, the possession of more than one hundred years would become a rightful one by prescription, even if it had begun in

[1] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 260).

wrong and injustice. The acquiescence of the adjoining state for such a lapse of time, would be conclusive evidence that she assented to the possession thus held, and had determined to relinquish her claims. The possession, therefore, if a defence at all, is a separate and complete one of itself; and forms no part of the accord and agreement alleged in the plea. Here, then, are two defences in the same plea, contrary to the established rules of pleading.[1]

After an examination of the authorities by which the decision of the court on this phase of the question is to be sustained, and after a further caution that the action of the Court in overruling the plea is not an expression of opinion, either in favour of Rhode Island or against Massachusetts, as the merits of the controversy can only arise after the pleadings have been settled and the argument of the case, the learned Chief Justice, speaking for the court, thus concludes his opinion:

Technicalities overruled.

The course determined on recommends itself strongly to the Court, because it appears to be the only mode in which full justice can be done to both parties. Each will now be able to come to the final hearing, upon the real merits of their respective claims, unembarrassed by any technical rules. Such, unquestionably, is the attitude in which the parties ought to be placed in relation to each other. If the defendant supposed that the bill does not disclose a case which entitles Rhode Island to the relief she seeks, the whole subject can be brought to a hearing by a demurrer to the bill. If it is supposed, that any facts are misconceived by the complainants, and therefore, erroneously stated; the defendants can put these in issue by answering the bill. The whole case is open; and upon the rule to answer which the court will lay upon the defendant, Massachusetts is entirely at liberty to answer, as she may deem best for her own interests.[2]

Dissenting opinions.

It is to be observed for the sake of completeness that Justices McLean and Catron dissented from the opinion of the Court, the first in an elaborate and argumentative opinion, the second in a few remarks both to the effect that the plea was good and a bar to the action.

Inasmuch as Mr. Justice McLean delivered the opinion of the Court on the final phase of the controversy, after technicalities of pleading were brushed aside and the case was decided upon its merits, it is advisable to quote the last paragraph of Mr. McLean's opinion, in which he thus states his views in summary form:

The arguments of the counsel for the complainant, zealous and able as they were, rested mainly on the hardship and injustice of deciding this controversy on the pleadings as they now stand. The mistake is admitted; and what is there else in the bill taken in connection with all the facts and circumstances, which can give the case of the complainant a more imposing form. No fraud is imputed; the sealed instruments now and ever, must speak the same language; the effect of time will remain; and the excuses alleged in the bill for delay, can scarcely have, under any form of pleading, greater effect than may be given to them as the case now stands. I do not speak of the volume of evidence which may be thrown into the case by a change of the pleadings; but of the leading and indisputable facts which must, under any form of precedure, have a controlling influence on the decision. Believing, as I do, that in admitting the truth of the plea, Rhode Island has done nothing prejudicial to her interests; and that in the present attitude of the case, its substantial merits are before us, I feel bound to pronounce a different opinion from that which has been given by a majority of my brother judges. Taking the facts of the plea, and giving due weight to the allegations of the bill, not denied by the plea, I am led to the conclusion that the bar is complete.[3]

[1] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 200–1).
[2] *Ibid.* (14 Peters, 210, 262).
[3] *Ibid.* (14 Peters, 210, 279).

14. State of Rhode Island v. State of Massachusetts.

(15 Peters, 233) 1841.

In the previous phase of the case, Mr. Chief Justice Taney, on behalf of the court, objected to the plea filed to the amended bill of the plaintiff as giving to the defendant an unfair advantage if it should be sustained, as limiting its case to those allegations put in issue by the plea ; and for the further reason that it was multifarious, in that it presented more than one defence, whereas a plea, to be good, should confine itself to a single defence. He pointed out the distinction between a plea on the one hand and a demurrer on the other, stating the nature of each, in order that plaintiff and defendant might know and therefore prepare to argue the case on final hearing as disclosed by the pleadings, found by the court to be sufficient in form and fair to the parties. The defendant's plea was overruled, and Massachusetts was given until the following term to answer ; not meaning, however, to restrict the defendant to the form of pleading known as an answer, but, in untechnical language, a reply or a statement which would allow the case, as made out by the plaintiff, to be heard at the same time with the matters of defence which the State of Massachusetts could properly interpose. The court apparently seemed to counsel for Massachusetts to incline to the demurrer, as Mr. Chief Justice Taney had said :

If a defendant supposes that there is no equity in the bill his appropriate answer to it is a demurrer ; which brings forward at once the whole case for argument.[1]

Demurrer filed by Massachusetts.

They therefore took what they were pleased to consider a hint, as they conceived it to be in their interest to do so, and in the January term Mr. Austin, Attorney-General for the Commonwealth, and Mr. Webster, ' for himself,' filed and argued a demurrer to the bill ; and Messrs. Randolph and Whipple argued against the demurrer for Rhode Island.

Mr. Chief Justice Taney again delivered the opinion of the court, and as the case was so recent, and so in the minds of his brethren, it was unnecessary to enter into its details, the Chief Justice therefore contented himself with the statement that :

In this state of the pleadings, the question is directly presented, whether the case stated by Rhode Island in her bill, admitting it to be true as there stated, entitled her to relief.[2]

In the very next sentence, which is indeed the first of the second paragraph, Mr. Chief Justice Taney reiterates the great outstanding fact by which he and his brethren were impressed :

The character of the case, and of the parties, has made it the duty of the Court to examine very carefully the different questions which, from time to time, have arisen in these proceedings. And if those which are brought up by the demurrer were new to the Court, or if the judgment now to be pronounced would seriously influence the ultimate decision ; we should deem it proper to hold the subject under advisement, until the next term, for the purpose of giving to it a more deliberate examination. But although the questions now before the Court did not arise upon the plea, and, of course, were not then decided, yet much of the argument on that occasion turned upon principles which are involved in the case as it now stands. The facts stated in the bill were brought before us, and the grounds upon which the

[1] *State of Rhode Island* v. *State of Massachusetts* (14 Peters, 210, 262).
[2] *Ibid.* (15 Peters, 233, 269).

complainant claimed relief were necessarily discussed in the argument at the bar, and the attention of the Court strongly drawn to the subject. The whole case, as presented by the bill and demurrer, has been again fully and able argued, at the present term : and as the Court has made up its opinion, and are satisfied that the delay of our judgment to the next term would not enable us to obtain more or better light upon the subject, it would be useless to postpone the decision.[1]

The question for the Court to determine was whether, admitting the truth of the facts stated in the bill, and admitting that they could be substantiated at the hearing, the law applicable to the case as made out by the facts would in itself preclude the relief prayed by the complainant. A decision of the court in favour of the demurrer would, as far as these pleadings were concerned, decide the case in favour of Massachusetts against Rhode Island. It is necessary to understand the situation created by the demurrer, and to this situation the opinion of Chief Justice Taney, speaking for the court, addresses itself.

Decision of the Court overruling the demurrer.

In the first place, he defines the demurrer with more care and particularity than in the preceding case. Thus :

Allegations in the bill filed by Rhode Island.

The demurrer admits the truth of the facts alleged in the bill, and it is sufficient for the purposes of this opinion to state in a few words the material allegations contained in it.

1st. It alleges that the true boundary line between Massachusetts and Rhode Island, by virtue of their charters from the English crown, is a line run east and west three miles south of Charles river, or any or every part thereof ; and sets out the charters which support, in this respect, the averments in the bill.

2d. That Massachusetts holds possession to a line seven miles south of Charles river, which does not run east and west, but runs south of a west course ; and that the territory between this line and the true one above mentioned, belongs to Rhode Island, and, that the defendant unjustly withholds it from her.

3d. That Massachusetts obtained possession of this territory under certain agreements and proceedings of commissioners appointed by the two colonies, which are set out at large in the bill ; and the complainant avers that the commissioners on the part of Rhode Island, agreed to this line under the mistaken belief that it was only three miles south of Charles river ; and that they were led into this mistake by the representations made to them by the commissioners on the part of Massachusetts ; upon whose statements they relied.

4th. That this agreement of the commissioners was never ratified by either of the colonies : and the bill sets out the various proceedings of the commissioners and legislatures of the two colonies, which if not sufficient to establish the correctness of the averments, are yet not incompatible with it.

5th. The bill further states that the mistake was not discovered by Rhode Island until 1740, when she soon afterwards took measures to correct it ; that she never acquiesced in the possession of Massachusetts, after the mistake was discovered, but has ever since continually resisted it ; and never admitted any line as the true boundary between them, but the one called for by the charters. Various proceedings are set out, and facts stated in the bill, to show that the complainant never acquiesced ; and to account for the delay in prosecuting her claim. Whether they are sufficient or not for that purpose, is not now in question. They are certainly consistent with the averment, and tend to support it.[2]

The Chief Justice next proceeds to state in summary form the complainant's case as it results from this series of admissions on the part of the defendant, and to

[1] *State of Rhode Island* v. *State of Massachusetts* (15 Peters, 233, 269).
[2] *Ibid.* (15 Peters, 233, 270).

ask if the law applicable to the situation will or will not allow the agreement between the parties in controversy to be set aside because of the mistake alleged by the complainant ?

Thus he says :

> The case then, made by the bill, and to be now taken as true, is substantially this : The charter boundary between these colonies was three miles south of Charles river ; and the parties intending to mark a line in that place, marked it by mistake, four miles further south, encroaching so much on the territory of Rhode Island ; and the complainant was led into this mistake by confiding in the representations of the commissioners of the defendant. And as soon as the error was discovered, she made claim to the true line and has ever since contended for it. We speak of the case, as it appears upon the pleadings. It may prove to be a very different one, hereafter, when the evidence on those sides is produced. But taking it as it now stands, if it were a dispute between two individuals, in relation to one of the ordinary subjects of private contract ; and there had been no laches to deprive the party of his title to relief ; would a Court of Equity compel him to abide by a contract entered into under such circumstances ? [1]

That is to say, the question before the court, in even more untechnical language than that used by Mr. Chief Justice Taney, reduces itself to this : Admitting all the facts alleged by Rhode Island in its statement of the case to be true, does the law applicable to the case permit or prevent the recovery of the tract of land claimed by Rhode Island to be wrongfully in the possession of Massachusetts ; or does the applicability of the principles of law involved depend to such a degree on the proof to be advanced by Rhode Island in support of its contentions as to make it inequitable to sustain the demurrer, and thus to dismiss the plaintiff's case ? It will be observed that Rhode Island admits the various agreements of 1709 and 1718 between the then colonies, and if the matter stood here this admission would be a bar to its case. But Rhode Island seeks to overcome the force of this admission on the ground that they were entered into by mistake, and the question of law at once arises, is an agreement entered into by one of the parties under mistake binding, or will a court of equity relieve against mistake. Mr. Chief Justice Taney, speaking of the rule of mistake, says :

The Court will set aside agreements induced by mistake

> It is one of the most familiar duties of a Chancery Court, to relieve against mistake, especially when it has been produced by the representations of the adverse party. In this case, the fact mistaken was the very foundation of the agreement. There was no intention on either side to transfer territory, nor any consideration given by the one to the other to obtain it. Nor was there any dispute arising out of conflicting grants of the crown, or upon the construction of their charters, which they proposed to settle by compromise. Each party agreed that the boundary was three miles south of Charles river ; and the only object was to ascertain and mark that point ; and upon the case, as it comes before us, the complainant avers, and the defendant admits that the place marked, was seven miles south of the river, instead of three, and was fixed on by mistake ; and that the commissioners of Rhode Island were led into the error by confiding in the representations of Massachusetts' commissioners. Now, if this mistake had been discovered a few days after the agreements were made, and Rhode Island had immediately gone before a tribunal, having competent jurisdiction, upon principles of equity, to relieve against a mistake committed by such parties, can there be any doubt that the agreement would have been set aside, and Rhode Island restored to the true charter lines ? We think not.

[1] *State of Rhode Island* v. *State of Massachusetts* (15 Peters, 233, 271).

Agreements thus obtained cannot deprive the complainant of territory, which belonged to her before ; unless she has forfeited her title to relief, by acquiescence or unreasonable delay.[1] unless there are special reasons to the contrary.

This brings the Chief Justice to consider the argument of the counsel for Massachusetts, that, supposing Rhode Island could have set aside the agreement because of a mistake, she has lost the right so to do by failing to act within a reasonable time ; that she therefore acquiesced in the agreement, and can be held, by her conduct, to have ratified it. 'The answer to this argument', he says, 'is a very plain one.' 'The complainant avers', he continues, 'that she never acquiesced in the boundary claimed by the defendant, but has continually resisted it, since she discovered the mistake ; and that she has been prevented from prosecuting her claim, at an earlier day, by the circumstance mentioned in her bill. These averments and allegations, in the present state of the pleadings, must be taken as true ; and it is not necessary to decide now, whether they are sufficient to excuse the delay. But when it is admitted by the demurrer, that she never acquiesced, and has from time to time made efforts to regain the territory by negotiations with Massachusetts, and was prevented by the circumstances she mentions from appealing to the proper tribunal to grant her redress ; we cannot undertake to say, that the possession of Massachusetts has been such as to give her title by prescription ; nor that the laches and negligence of Rhode Island have been such as to forfeit her right to the interposition of a Court of Equity'.[2] Rhode Island has not forfeited her title to relief.

But in this aspect, as, indeed, in all the varying phases of the case, the principle of law is held, as it were, in abeyance, in order to see whether, upon reflection, it is applicable to the relations of States, as it would admittedly have been applicable to private parties. On this point court and counsel were at one. For example, Mr. Austin, speaking on behalf of Massachusetts, repeatedly called the attention of the court to the fact that the controversy was between States, and that it could only be governed by the law applicable to States ; and, because of the dignity of the parties as well as the absence of particular public law, he would have withdrawn the case from the Supreme Court, which, in his argument on the demurrer, he calls 'the arbiter of international controversies between the States of the Union'.[3] And Mr. Whipple, speaking on behalf of Rhode Island, likewise refers to the court as the tribunal established by the Constitution to decide questions between the States, and, in speaking of the statute of limitations—or of prescriptions, as it is ordinarily called in public law—he says :

> There is no provision in any statute in England, or this country, applicable to the subject-matter of this suit, jurisdiction, nor to the parties, sovereign states.

And, insisting that the doctrine cannot be applied, he says :

> Time, therefore, can only come to the aid of the defendant as a witness, to prove possession on the part of the defendant, and acquiescence on the part of the plaintiff.[4]

The Court, on its part, was mindful of the fact that the statute of limitations or the doctrine of prescription might very well be applicable to private parties, and

[1] *State of Rhode Island* v. *State of Massachusetts* (15 Peters, 233, 271–2).
[2] *Ibid.* (15 Peters, 233, 272). [3] *Ibid.* (15 Peters, 233, 249). [4] *Ibid.* (15 Peters, 233, 261).

yet be out of place between states or nations, and, speaking for his brethren, the Chief Justice thus pursues this phase of the question :

The statute of limitations does not apply to this dispute,

In cases between individuals, where the statute of limitations would be a bar at law, the same rule is undoubtedly applied in a Court of Equity. And when the fact appears on the face of the bill, and no circumstances are stated, which take the case out of the operation of the act ; the defendant may undoubtedly take advantage of it by demurrer ; and is not bound to plead or answer. The time necessary to operate as a bar in equity, is fixed at twenty years, by analogy to the statute of limitations ; and the rule is stated in Story's Com. Eq. Pl. 389, and is supported and illustrated by many authorities cited in the notes. It was recognized in this Court in the case of *Elmendorf* v. *Taylor*, 10 Wheat. 168–75. But it would be impossible with any semblance of justice to adopt such a rule of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals ; the boundary in question was in a wild unsettled country, and the error not likely to be discovered, until the lands were granted by the respective colonies, and the settlements approached the disputed line ; and the only tribunal that could relieve after the mistake was discovered, was on the other side of the Atlantic, and not bound to hear the case and proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations, make it equally evident, that a possession so obtained, and held by Massachusetts, under such circumstances, cannot give a title by prescription.

nor can the title be claimed by prescription

The demurrer, therefore, must be overruled.[1]

at this stage of the case.

But the Chief Justice, however, was not expressing an opinion of the Court as to the merits ; he only meant that the court could not, in the then circumstances of the case, rule as a matter of law that the statute of limitations applied and barred the complainant of relief. He was not expressing an opinion that the special facts, as distinguished from law, might not bring the case within the spirit of the statute and within the application of the doctrine. But as this could only be ascertained at the hearing, neither the principle nor the doctrine could be interposed as a bar to the hearing. Therefore he continued :

But the question upon the agreements, as well as that upon the lapse of time, may assume a very different aspect, if the defendant answers and denies the mistake ; and relies upon the lapse of time as evidence of acquiescence, or of such negligence and laches as will deprive the party of his right to the aid of a Court of Equity. It will then be open to him to show that there was no mistake ; that the line agreed on is the true charter line ; or that such must be presumed to have been the construction given to the charters by the commissioners of both colonies ; or that the agreement was a compromise of a disputed boundary, upon which each party must be supposed to have had equal means of knowledge.

So too, in relation to the facts stated in the bill to account for the delay. It will be in the power of the complainant to show, if she can, that her long-continued ignorance of an error (which, if it be one, was palpable and open,) was occasioned by the wild and unsettled state of the country ; and that the subsequent delay was produced by circumstances sufficiently cogent to justify it upon principles of justice and equity ; or was assented to by Massachusetts or occasioned by her conduct. And, on the other hand, it will be the right of the defendant to show, if she can, that Rhode Island could not have been ignorant of the true position of this line until 1740 ; or, if she remained in ignorance until that time, that it must have arisen from such negligence and inattention to her rights, as would render it inexcusable ; and should be treated, therefore, as if it had been acquiescence with knowledge ; or she may show that, after the mistake was admitted to have been discovered,

[1] *State of Rhode Island* v. *State of Massachusetts* (15 Peters, 233, 272–3).

Rhode Island was guilty of laches in not prosecuting her rights in the proper forum, and that the excuses offered for the delay are altogether unfounded or insufficient ; and that Massachusetts never assented to it, nor occasioned it.[1]

The passage last quoted is especially important as showing the attitude of the court in this class of cases. The Court is indeed neutral, but it is benevolent neutrality —a neutrality which advised the counsel for Rhode Island as to the proof necessary to sustain its allegations, and neutrality which advised the counsel for Massachusetts as to the proof necessary, not to overcome the contentions of Rhode Island, but to sustain its own contentions. Without ceasing to be a Court, it does, in these cases, consider itself in no uncertain sense as an arbiter anxious to do its full duty and to apply the law, remembering that ' the letter killeth but the spirit giveth life '. Therefore, Chief Justice Taney, in behalf of his brethren, thus concluded this phase of the subject, destined to be the last upon the pleadings before the final hearing of the case :

We state these questions as points that will remain open upon the final hearing, for the purpose of showing that the real merits of the controversy could not have been finally disposed of upon the present pleadings ; but without meaning to say that other questions may not be made by the parties, if they shall suppose them to arise upon the proceeding hereafter to be had. The points above suggested, which are excluded by the case as it now stands, make it evident that this controversy ought to be more fully before the Court, upon the answer, and the proofs to be offered upon both sides, before it is finally disposed of.

The Court will, therefore, order and decree that the demurrer be overruled ; and that the defendant answer the complainant's bill, on or before the first day of August next.[2]

Close of the pleadings Policy of the Court.

The pleadings in this case have been examined and dwelt upon at what may seem to be inordinate length, but it has been done consciously and in order to show how the court brushed aside as cobwebs one subtlety after another, until the case was decided upon the evident principle of fairness, which required the plaintiff to state all material facts and the defendant to present a complete answer in reply, in order that the court, sitting as arbiter, should decide upon the case as thus presented, without restriction upon the parties litigant in the presentation of their contentions and the evidence to support them.

15. State of Rhode Island v. State of Massachusetts.

(4 Howard, 591) 1846.

The final hearing.

In the January term of 1846 the case of *Rhode Island* v. *Massachusetts* (4 Howard, 590), came to a final hearing upon the amended bill of the complainant and the defendant's answer, pursuant to the decree of the court in the former phase of the case, upon the matured statement of Rhode Island and upon the matured defence of Massachusetts. The official reporter of the Supreme Court refuses to prefix a statement of the case, with an analysis of the historical documents filed by the respective parties, on the plea that to do this ' would require a volume '.

On behalf of Rhode Island the case was argued by Messrs. Randolph and Whipple, and on behalf of Massachusetts by Rufus Choate and Daniel Webster. But it is

[1] *State of Rhode Island* v. *State of Massachusetts* (15 Peters, 233, 273–4).
[2] *Ibid.* (15 Peters, 233, 274).

unnecessary to consider the briefs filed by counsel or to follow the details of the arguments. It is advisable, however, to quote the skeleton of Mr. Webster's argument, contained in the original report, as it states very briefly the final form in which counsel, closing for Massachusetts, rested the case; and it is, to all intents and purposes, the skeleton also of the decree of the Court as elaborately stated by Mr. Justice McLean in its behalf:

Summary of the case for each party.

The case of Rhode Island rests on two propositions:

1. That the disputed territory belongs to her, according to the true construction of the original charters.

2. That she has done nothing to abandon, surrender, or yield up her original right to the territory, or to close inquiry into those original rights.

Against these we maintain four propositions:

1. That the territory belongs to Massachusetts, according to the just interpretation of her original charter, and that no subsequent acts of the British crown or courts of law, nor any acts of her own, have impaired or lessened her right in this respect.

2. That the line up to which she now possesses has been seated and established by fair and explicit agreements between the two parties, executed without misrepresentation or mistake, and with equal means of knowledge on both sides; and that she has held possession accordingly, from the dates of those agreements.

3. That if all this were otherwise, Massachusetts is entitled, by prescription and equitable limitation, to hold to the limits of her present possession.

4. That Rhode Island, by her own neglect or laches, is precluded from asserting her claim to the disputed territory, if she ever had such claim, or from opening the question for discussion now.[1]

It has been repeatedly observed, in the course of this narrative, and the court itself has as often stated it, that the judges approached this case with the full sense of its importance, and, in their desire to do justice, never overlooked the nature, the character, and dignity of the parties honouring the court by their presence. A further testimony of this, if one were needed, is supplied by Mr. Justice McLean, delivering the opinion of the court, who puts it in the strongest terms in the very first sentence of that opinion. 'We approach this case', he says, 'under a due sense of the dignity of the parties, and of the importance of the principles which it involves.'[2] Without further introduction, he thus states in summary form the outstanding jurisdictional facts and the nature of the case, before entering into the details necessary, in his case, but fortunately unnecessary in ours:

Decision of the Court in favour of Massachusetts.

The jurisdiction of the court having been settled at a former term, we are now only to ascertain and determine the boundary in dispute. This, disconnected with the consequences which follow, is a simple question, differing little, if any, in principle from a disputed line between individuals. It involves neither a cession of territory, nor the exercise of a political jurisdiction. In settling the rights of the respective parties, we do nothing more than ascertain the true boundary, and the territory up to that line on either side necessarily falls within the proper jurisdiction.[3]

This is important, in that it indicates that objection was made, as we know, to the jurisdiction, and that the court determined that it could properly entertain, indeed that it could not refuse to entertain the case. The Court was much impressed, and rightly, with the agreements entered into by the two Colonies to determine the boundary and to draw the line, and found it very difficult either to make good the

[1] *State of Rhode Island* v. *State of Massachusetts* (4 Howard, 591, 613–14).
[2] *Ibid.* (4 Howard, 591, 628).
[3] *Ibid.* (4 Howard, 591, 628).

lack of knowledge or to justify the lack thereof respecting the original boundary. The court considered the matter doubtful, as the point could have been located three miles south of the Charles River itself, or three miles south of a branch thereof, which could, for purposes of boundary, be considered the Charles River. The court, therefore, felt itself justified in looking to the acts of the parties to ascertain their interpretation of the charters when it was called in question. 'The fact of a want of this knowledge,' Mr. Justice McLean said, 'after the lapse of more than a century and a quarter, is difficult to establish;'[1] and he proceeded to state that a more recent mistake would have vitiated the agreement between the parties, saying on this point:

It may be a matter of doubt, whether a mistake of recent occurrence, committed by so high an agency in so responsible a duty, could be corrected by a court of chancery. Except on the clearest proof of the mistake, it is certain there could be no relief. No treaty has been held void, on the ground of misapprehension of the facts, by either or both parties.[2]

But whether this would or would not be sound doctrine between individuals, there is more to be said for it between states, where certainty of boundary is even more important than accuracy of the line, in order to prevent frontier incidents, which often result into war.

As was to be expected, Mr. Justice McLean, on behalf of the court, made an elaborate statement of the facts of the case, inasmuch as it was necessary so to do in order to justify the decree in so far as it depended upon fact; and he likewise made a careful summary of the complainant's contentions, inasmuch as it was necessary to state them, in order to test the principles upon which Rhode Island claimed its right of recovery. Necessary for the court, this is fortunately not necessary for this narrative, inasmuch as the facts and pleadings material to the case are either before the reader or within his reach. After having completed this portion of his task, difficult and far from inspiring, the learned Justice thus stated what the court considered to be the material contentions of the little State:

1. The misconstruction of the charter.
2. The mistake as to the true location of the Woodward and Saffrey station.

Upon these he comments:

If the first be ruled against the complainant, the second must fall as a consequence. And as regards the first ground, little need be added to what has already been said. The charter is of doubtful construction, and may, without doing violence to its language, be construed in favour of or against the position of the complainant. In this view, the construction of the charter of Massachusetts, assented to by the old colony of Plymouth, many years before Connecticut or Rhode Island had a political organization, is an important fact in the case.[3]

Construction of the charter.

The learned Justice here states the contentions between Plymouth and Massachusetts, on the one hand, and with Connecticut and Rhode Island on the other, concluding thus:

Connecticut, after the lapse of many years, assented to the line run from the Woodward and Saffrey station as its boundary, and so did the complainant, in the most solemn agreements, as stated.[4]

[1] *State of Rhode Island* v. *State of Massachusetts* (4 Howard, 591, 635).
[2] *Ibid.* (4 Howard, 591, 635). [3] *Ibid.* (4 Howard, 591, 636). [4] *Ibid.* (4 Howard, 591, 637).

Conduct of the parties.

This phase of the case seemed very important to the Court, for, in the case of a doubtful character or of two possible interpretations, each consistent with its terms, the actions of the parties, and, indeed, of other parties in relation to them, is of importance, especially when the very cause of the interpretation in each case was a dispute as to the boundary, and as the agreement reached in each was intended to end it. 'These proceedings', in the language of the court, 'conduce strongly to establish a fixed construction of the charter, favorable to the respondent, unless it be clearly made to appear that they were founded on mistake or fraud.'[1] The element of fraud could be eliminated as the court found that it was not charged, and the court therefore only had to inquire into and to consider the alleged mistake.[2]

The question of mistake.

The supposed mistake was scarcely susceptible of proof, and in an earlier portion of his opinion, after setting forth the agreements had between the parties, the learned Justice concluded that 'the fact of a want of this knowledge, after the lapse of more than a century and a quarter, is difficult to establish. It certainly cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge. If the Rhode Island commissioners were misled in the first agreement, as to the locality of this station, it almost surpasses belief, that, seven years afterwards, the subject of the line having been discussed in Rhode Island, and such dissatisfaction being shown by the people as to lead to a new commission, the second commission should again be misled'.[3]

But even admitting the mistake, the court doubted, as already mentioned, whether a mistake of recent origin should be corrected by a court of chancery, committed as it was by an agency in so responsible a duty.

But the real ground for the decision was that the controversy was between two states, alleging themselves, in the matter of justice, to be sovereign. Consequently, remedies appropriate to individuals would be scrutinized before applying them, without modification, to the claims of states; and a political status depending upon them would not be set aside or modified, unless the facts and the principles of law applicable compelled rather than that they justified it. This phase of the question pervades the case; indeed, it was the case, and it was ever before the eyes of the judges and even upon their lips. Thus, after speaking of the question of mistake, Mr. Justice McLean proceeds, speaking for the august tribunal of which he was a member:

This dispute is between two sovereign and independent states. It originated in the infancy of their history, when the question in contest was of little importance. And fortunately steps were early taken to settle it in a mode honorable and just, and one most likely to lead to a satisfactory result. There is no objection to the joint commission in this case, as to their authority, capacity, or the fairness of their proceedings. An innocent mistake is all that is alleged against their decision. And as has been shown, this mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station. But if the mistake were admitted as broadly and fully as charged in the bill, could the court give the relief asked by the complainant?[4]

Mistake not proved.

Perhaps it might, as between private parties, but the authority of a very great man was invoked to show that it would not or should not, in a controversy between

[1] *State of Rhode Island* v. *State of Massachusetts* (4 Howard, 591, 637).
[2] *Ibid.* (4 Howard, 591, 637). [3] *Ibid.* (4 Howard, 591, 635). [4] *Ibid.* (4 Howard, 591, 638).

political bodies. And this opinion, although not given in the case of Rhode Island but in that of Connecticut, whose case was admitted to be similar to that of the contentious little State, has a double point. Thus, to quote Mr. Justice McLean :

Opinion of Lord Mansfield cited.

In 1754, William Murray, then attorney-general, afterwards Lord Mansfield, was consulted by Connecticut, whether the agreement with Massachusetts respecting their common boundary, in 1713, would be set aside by a commission appointed by the crown. To which Mr. Murray replied,—' I am of opinion, that, in settling the above-mentioned boundary, the crown will not disturb the settlement by the two provinces so long ago as 1713. I apprehend his Majesty will confirm their agreement, which of itself, is not binding on the crown, but neither province should be suffered to litigate such an amicable compromise of doubtful boundaries. If the matter was open, the same construction already made in the case of the Merrimac River must be put upon the same words in the same charter applied to Charles River. As to Jack's Brook, it is impossible to say whether 't is part of Charles River, without a view, at least without an exact plan, and knowing how it has been reputed.' [1]

The balance of Mr. Justice McLean's comment on this point is mathematical : if forty-one years were too late, what must be the weight of the years in this case, well nigh two centuries when the case was heard. But, mathematical though it may be, on this point Mr. Justice McLean's language deserves to be quoted :

Lapse of time.

From the settlement referred to up to the time this opinion was given by Mr. Murray, forty-one years only had elapsed. And if that time was sufficient to protect that agreement, with how much greater force does the principle apply to the agreements under consideration, which are protected by the lapse of almost a century and a quarter. More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin.[2]

Undisturbed possession.

But this mere statement is almost decisive of the case, for it was not only possession under a claim of right, but possession under a claim of right admitted by the parties in interest, to overcome which it would indeed require arguments of a compelling nature. Thus, Mr. Justice McLean elaborates and gives point to this element of the case :

Rhode Island bound by the agreements.

The possession of the respondent was taken not only under a claim or right, but that right in the most solemn form has been admitted by the complainant and by the other colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made nearly a century has transpired. If in the agreements there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their powers, for they were authorized ' to agree and settle the line between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they can compromise the same '. Under this authority, can the complainant insist on setting aside the agreements, because the words of the charter were not strictly observed ? It is not clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But if in this respect there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718.[3]

[1] *State of Rhode Island* v. *State of Massachusetts* (4 Howard, 591, 638).
[2] *Ibid.* (4 Howard, 591, 638).
[3] *Ibid.* (4 Howard, 591, 638 9).

And with a reference to the effect of time, forming if it does not create title and moulding all things to its will, Mr. Justice McLean continues and thus ends this historical and hope giving case, a landmark in the long way from self-redress to judicial settlement through the intervention of the bystander, arbiter, umpire, Court:

No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or of individuals, long possession under a claim of title, is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in the case of disputed boundary.

The state of Rhode Island, in pursuing this matter, has acted in good faith and under a conviction of right. Possessing these elements, in an eminent degree, which constitute moral and intellectual power, it was perseveringly and ably submitted its case for a final decision.

Bill dismissed, 1846.

The bill must be dismissed.[1]

Exercising the right which he had reserved, to express his opinion at fuller length, should it be necessary on the final disposition of the controversy between Rhode Island and Massachusetts, in which he had taken part, and on two occasions had delivered the opinion of the court in the matter of pleadings, Mr. Chief Justice Taney contented himself with a brief statement of his views which reflection had confirmed, inasmuch as he found himself in accord with the decision of the court dismissing the bill, although, in his opinion, it should have been dismissed for lack of jurisdiction, not at final hearing upon the merits. In the course of his very brief remarks, rather than opinion, Mr. Chief Justice Taney said:

Opinion of Chief Justice Taney denying jurisdiction.

Deciding the case, so far as I am concerned, upon this point, I of course express no opinion upon the merits of the controversy; and have not even deemed it necessary to be present at the elaborate arguments upon the evidence which have been made at the present term. For if Rhode Island had proved herself to be justly and clearly entitled to exercise sovereignty and dominion over the territory in question, and the people who inhabit it, yet my judgment must still have been, that the bill should be dismissed, upon the ground that this court, under the Constitution of the United States, have not the power to try such a question between States, or redress such a wrong, even if the wrong is proved to have been done.[2]

It may be said, however, in this connexion, that although the views he entertained in that case had been confirmed by subsequent reflection, more prolonged reflection finally led him to concur in the exercise of jurisdiction, and indeed to deliver the opinion of the court in boundary disputes involving precisely the same principles as in *Rhode Island* v. *Massachusetts*. And these opinions, although not so elaborate as that of Mr. Justice Baldwin entertaining jurisdiction, from which the Chief Justice dissented, are referred to in the same connexion and in support of the jurisdiction of the Supreme Court. The conversion of Chief Justice Taney may not have been that of the man pointed out by the satirist—

> And finds with keen, discriminating sight
> Black 's not so black—nor white so *very* white. . . .

But the submission of personal judgement so noticeable in Anglo-American courts

[1] *State of Rhode Island* v. *State of Massachusetts* (4 Howard, 591, 639).
[2] *Ibid.* (4 Howard, 591, 640).

of justice to the decision of the majority, and the development by association of that enlarged view that comes from intimate and daily contact with superior minds, are fortunately characteristic of courts of justice in general, whose members meet and co-operate in the administration of justice.

General comments on the first group of cases.

There are several points which we may well pause to consider as having been determined by court and counsel, before proceeding to an examination of the second group of cases, the last of which involves the question of executing a judgement had against a state. In this first series, whose importance cannot be overstated, the nature of the jurisdiction of the court was established, the procedure to be followed devised, the means of securing the attendance of the defendant state and compliance with the judgement stated, and a method adopted by which, in the absence of a defendant state, the entire question could be laid before the court, argued, expressed in the form of a decree or a judgement, in order that public opinion might complete the work of justice where unaided reason was weak and physical force excluded.

The first question to be considered in this summary of results is that of jurisdiction. It was argued by court and counsel in the matter of *Chisholm* v. *Georgia* (2 Dallas, 419), but as the 11th amendment to the Constitution withdrew jurisdiction from the court in such cases it is advisable to omit reference to that very important but misleading case, and to base our observations upon that portion of the judicial power which has been declared by the court to exist, and which has neither been questioned nor withdrawn by amendment. But it is not necessary to enlarge, nor, indeed, to dwell upon this phase of the subject. It is sufficient to say that, in the ninth suit of State against State, excluding *Cherokee Nation* v. *Georgia* (5 Peters, 1), and in the third phase of *Rhode Island* v. *Massachusetts* (12 Peters, 657), the question of the jurisdiction of the Supreme Court in suits between States was elaborately, exhaustively, indeed exhaustingly considered and the jurisdiction of the court established, as is the wont in English-speaking countries, by contending counsel debating the question in a court of justice and by a judgement or decree of the court, instructed but not controlled by counsel.

Jurisdiction of the Court established.

With the decision of this phase of the case it was evident that, if all controversies that might arise between States were not specifically included in the grant of power, no one category was even impliedly excluded, always provided that the controversy was one to which the judicial power of the States could be extended—that is to say, one which, if referred to a court of justice, could be decided by a principle of law, becoming by the submission a judicial, although it has been previously a political question. Every succeeding case has built upon *Rhode Island* v. *Massachusetts* as a firm foundation, and it may be said, without disrespect to subsequent cases, that they are but variations and applications of the principle there established. They are indeed important, but their importance lies rather in the repetition of the principle than in any principle which they themselves lay down.

The question of jurisdiction arises in each case.

The next point to be borne in mind, fundamental alike in national and international jurisprudence, and inevitable in a court of limited jurisdiction such as the Supreme Court, and as an international court must necessarily be, is that, before assuming jurisdiction, the question of jurisdiction can be raised by counsel, and if not raised by counsel it must be decided by the court. The express language of Mr. Justice

Baldwin on this point will be recalled, and does not need to be again set forth, and its truth is illustrated by every suit between States entertained by this august tribunal. It is, however, advisable to refer to an expression in a later case, when counsel denied the jurisdiction of the Supreme Court in the suit of the *United States* v. *the State of Texas* (143 U.S. 621), decided in 1892. Jurisdiction had been ascertained in a case of this nature entitled *United States* v. *North Carolina* (136 U.S. 211, 245), decided in 1890, although the question of jurisdiction had not been argued. ' It is true,' said Mr. Justice Harlan, in delivering the judgement in the case of *United States* v. *Texas*, in which the question of jurisdiction was elaborately considered and sustained, ' that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgement would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State.' [1] And rightly so, because a court of limited powers owes its jurisdiction to the law of its creation, and it cannot exercise jurisdiction by consent or by negligence of counsel. It must examine its own powers, because, if it does not have jurisdiction, its judgement is null and of no effect. In the familiar phrase in a foreign tongue, the judgement is *coram non judice.*

Question of bringing the defendant State to Court.

The next point, and indeed one which may be considered in a way as preceding the question of jurisdiction, is the method of getting the defendant State before the court; and yet this phase of the subject is subordinate to that of jurisdiction, because, if a State be not a party, the Court cannot take jurisdiction, it cannot even consider the question, much less the procedure by which the State has appeared. But waiving questions of priority, as every step in this procedure is of importance, it is evident, from the very first case tried in the court (*New York* v. *Connecticut*, 4 Dallas, 1–6), that the suit must be between States not merely in form, but that the State shall be interested in the case, that it appear in behalf of its interest and not in behalf of private persons maintaining that the interests of the State are involved. This part of the subject is more connected with jurisdiction than with procedure, but it leads up to the question, how a State, a party in fact, may be notified of the suit ?

In the first place, the plaintiff State appears by counsel before the Supreme Court and asks leave to file its declaration or its bill against the defendant State. Permission is a matter of course, unless the court should be of opinion that the suit is improperly brought, when it will require, of its own motion, that the question of leave be set for argument, and that the State be heard on the propriety of granting leave. The procedure of the Court, after many years' experience, was briefly stated and confirmed by Chief Justice Chase, in granting leave to file the bill in the case of *Georgia* v. *Grant* (6 Wallace, 241), decided in 1867.

Service upon the Governor and Attorney-General.

But how is the appearance of the defendant State to be secured ? In the suits by individuals against States before the passage of the 11th amendment, withdrawing jurisdiction in such cases, it had been determined, as Chief Justice Marshall states at length in the second phase of *New Jersey* v. *New York* (5 Peters, 284), that the *subpoena* should issue out of the Supreme Court at the request of the plaintiff State; and that it should be served upon the Governor and the Attorney-General of the State,

[1] *United States* v. *State of Texas* (143 U.S. 621, 642).

commanding it to appear within sixty days after service. But suppose that the State thus summoned should not appear? Is the plaintiff to be deprived of his day in the court, or is the State to be compelled by force of arms to appear and to litigate the question? The great Chief Justice declared, in the same case, that the practice of the Court had been fixed in such cases by permitting the plaintiff to proceed with its case in the absence of the defendant State duly notified and duly summoned— not to take judgement by default, as would have been proper in suits between individuals, but inconsistent with the dignity of states, which proverbially move slowly, and which have a right to be heard when they appear.

In case of non-appearance plaintiff may proceed *ex parte*.

But again, supposing that the plaintiff insisted upon the presence of the defendant? This was a bridge which the Court was unwilling to cross unless forced to it, as Chief Justice Marshall had said in the phase of *New Jersey* v. *New York*, already referred to in this connexion, that the Court would content itself with deciding the immediate issue and would not attempt to forecast its future action, wisely leaving this to depend upon the facts and circumstances as they presented themselves. This phase of the question did, however, present itself in *Massachusetts* v. *Rhode Island* (12 Peters, 755), the fourth phase of the case when Daniel Webster moved, on behalf of Massachusetts, for leave to withdraw its appearance, after the Supreme Court had sustained jurisdiction in the previous phase. Mr. Justice Thompson held that this question had not previously arisen, but the motion of counsel for Massachusetts raised it squarely, and that it was therefore the duty of the Court to decide it. Cautiously he examined the steps already taken in the matter of procedure, and, from a consideration of the precedents and the nature of the parties litigant, he declared without hesitation, speaking for the Court of which he was a member:

No coercive process against a State.

that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measure will be taken to compel appearance; but the complainant, or plaintiff, will be allowed to proceed *ex parte*.

It is to be observed, in this connexion, that the Court used the expressions 'complainant, or plaintiff', in order that its meaning might not be misunderstood and that the question before it, in all its phases, might be settled by its decision; for the term 'complainant' is technically correct in a suit in equity, whereas the term 'plaintiff' is technically correct in a suit at law. Therefore, in one case as well as in the other, the appearance of the State is voluntary, it cannot be forced, and because of this fact Mr. Justice Thompson, still speaking for the Court, said:

If, upon this view of the case, the counsel for the State of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given; and the state of Rhode Island may proceed *ex parte*.

It was a small case, but the usefulness if not the fate of the Supreme Court was bound up in it. A sovereign state may appear at the bar of the Court and summon the State before it. This sovereign state may, in the exercise of its sovereign discretion, appear or refuse to appear. It is not to be coerced. But whether it appear or whether it absent itself, it cannot block the course of justice. The plaintiff State cannot take judgement *ex confesso*, that is to say, the failure to appear is not to be construed as an admission of the plaintiff's case. But the plaintiff may, as if the defendant were present, unfold its case before the court, with the certainty that, if its contentions be supported by proof and a principle of law be found applicable,

a decree or a judgement will be entered in accordance with the evidence and the law.

Finally, the question of procedure in the technical sense of the word is to be considered, for with the decision of the fourteenth case the procedure of the court was determined and fixed. In this matter court and counsel were on new ground, and they stepped cautiously lest they might stumble. It was contended in argument and it was admitted by the Court through its great Chief Justice that there was no statute regulating the procedure to be followed. It was evident from the Constitution that its framers contemplated law and equity, as in the very clause granting jurisdiction the judicial power of the United States was extended to all suits in law and equity, and it would seem to follow that the procedure applicable in law, as well as the procedure applicable in equity, should be observed; and law and equity, as used in the Constitution, were the law and equity of the mother country, with which colonial and revolutionary statesmen were familiar. But the law and equity of the mother country, and the procedure in each case, applied to individuals not to States, for states had not been litigants before our revolutionary ancestors discovered that States were but a generic name for the people composing them. But as it has been stated, as it will be stated in the future—for it cannot be said too often—States have a temper of their own, and what might suit the individual, who has no volition in the matter, might fail to suit the state, which determines the matter, and whose *amour propre* is as sensitive as the sum total of the citizens composing it.

Counsel and Court alike recognized this, and, while the Court admitted the principles of chancery practice as the procedure to be followed—as was stated elaborately by Mr. Justice Baldwin in the third phase of *Rhode Island* v. *Massachusetts* (12 Peters, 657) and as restated by Chief Justice Taney and Mr. Justice McLean in the subsequent phases of this historic case—the system of equity procedure was nevertheless to be modified in such a way as to permit the plaintiff to present its entire case and to allow the defendant to make its complete defence, without the advantages of technicalities, on the one hand, or of the embarrassment of such technicalities, on the other. The rules of equity pleading were to guide counsel, they were not to master the States, and the interests of justice were to be promoted even at the expense of the pleadings.

English equity procedure followed with modifications.

In pursuance of these views, and in accordance with the procedure developed, if not devised, in the trial of the cases, the first final judgement of the Supreme Court of the United States in a controversy of a State against a State was had in the fourteenth case of which it had assumed jurisdiction. There was but one question left undecided, although it had been touched upon by counsel and by court, which, if decided, would have outlined in its entirety the procedure to be followed in controversies of a justiciable nature between the States. That question was: if a State should refuse to comply with a judgement rendered by the Supreme Court in a controversy of a justiciable nature between two or more States, is the judgement to be executed by physical force against it? In other words, if coercion is not to be employed against the State to compel its appearance, is coercion to be employed against the State to compel the execution of the judgement, when the appearance of the State is voluntary and may be withdrawn at any time?

The possibility of resistance to a judgement.

The judicial settlement of disputes between States which, if not settled, might

have produced war, as controversies susceptible of judicial settlement between nations undoubtedly have, was agreed upon in the conference of States held at Philadelphia in the summer of 1787, and the first case in which final judgement or decree was entered in the supreme court of the states, vested with the jurisdiction of suits between states, was that of *Rhode Island* v. *Massachusetts* (4 Howard, 591), decided in 1846, a long period in the life of man but which, in the life of nations, is as a day. But the court had been resorted to and its intervention sought thirteen times. The Court itself was new, the method of settling suits between States claiming to be sovereign, and which, in the exercise of their undoubted sovereignty, had agreed to be sued in the court of their creation, was untried, and there were no precedents at hand to guide court and counsel. There was a belief in the conference that the government of the state, as the creature of the people, should not be above the law of its creation, and the experience of the colonies before the king in council showed them that the disputes of colonies at least could be, because they were, settled by some body upon the principles of justice and of reason—upon the principles of reason when the principle of law was not enough, and upon the principles of justice when the dispute was of a justiciable nature. The states were the colonies of yesterday, and the leaders of public opinion found themselves statesmen. It was natural, therefore, that they should adopt methods of settlement with which they were familiar. The storm and stress of the Revolution showed it to be expedient. The 9th of the Articles of Confederation is based upon the procedure before the king in council; the method of choosing the commissioners was borrowed from Granville's act of 1770 for trying election cases, with which the statesmen had been familiar as colonists. The framers of the Constitution hit upon the happy expedient of making that permanent which was temporary, and regular which was intermittent, by vesting the Court of their creation with the jurisdiction of the 9th of the Articles of Confederation in cases of a justiciable nature between States of the Union and foreign States, between the Government of the United States and the States, and perhaps—for the 11th amendment casts doubt upon it—between citizens of other states and the States themselves.

It is no wonder that court and counsel were impressed, indeed almost awed, by the spectacle of a State standing, as it were, before the bar of the Supreme Court, asking justice at the hands of the court against another State, which likewise appeared and stood before the bar of the Court as a defendant. And it is no wonder, indeed it is their great glory, that counsel and court, admitting that justice should regulate the conduct of States as well as of the people composing the States and directing their conduct, should nevertheless recognize that States have a temper of their own, and that the procedure applicable to individuals should be modified and moulded so as to do justice, not to prevent justice, between the states. Impressively, slowly and cautiously, counsel and court debated each question involved in a case as it presented itself, and neither counsel nor court sought to go beyond the immediate point—to push boldly, as it were, upon an uncharted sea—but were content to decide the immediate question, in the belief, justified by the event, that, as the result of experience, the procedure proper in such cases would be fashioned by their hands and assume definite form and shape.

V.

JURISDICTION AFFIRMED; INTERVENTION OF UNITED STATES IN SUITS BETWEEN STATES; FIRST PHASE OF POWER OF COURT TO ENFORCE ITS JUDGEMENT.

16. State of Missouri v. State of Iowa.

(7 Howard, 660) 1849.

On December 10, 1847, the State of Missouri filed its bill against the State of Iowa. Both these States were unknown to the framers of the Constitution, as they were carved out of a territory not possessed by the United States when the Constitution was framed in conference at Philadelphia in the fateful summer of 1787 and ratified in first instance by eleven, and a little later by the two recalcitrants, of which litigious Rhode Island was one, making the full complement of the original thirteen States. The judicial power of the United States not only extends to controversies between the original States, but also to territories not then in contemplation and out of which States, enjoying full membership in this Union of States, have been formed. The western boundary of the United States was from Canada on the north to the Gulf of Mexico on the south, and the boundary to the west itself was supposed to be the middle of the Mississippi running, as it was then supposed, from Canada to the Gulf. Spain then admittedly possessed the territory to the west of the Mississippi and claimed in addition a strip near the mouth of that majestic river extending eastward to and including the Floridas. The young Republic felt the need of the Mississippi as a high way and demanded navigation as a right which Spain was hardly willing to grant as a concession. The situation changed when, in 1801, Spain retroceded to France the vast tract west of the Mississippi; and it again changed when war broke out in 1803 between France and Great Britain and the possibility stared the great Napoleon in the face of relinquishing to Great Britain this vast tract because of British supremacy upon the high seas. President Jefferson was negotiating for the purchase of a town; Napoleon offered an empire, and the President, straining at a gnat, swallowed a camel. For the paltry sum of fifteen million five hundred thousand dollars, Louisiana became the domain of the United States.

The State of Missouri formed a part of this territory, and with boundaries established by the Congress—for the Congress admits States and determines the conditions of their admission to the Union—it was admitted as a state upon an equality with the other states in the year 1820. From the territory to the north the territory of Iowa was later formed, with boundaries fixed by Congress, and admitted as a state on an equality with the other states in 1846. The question was one of boundaries, Missouri claiming a strip of territory which Iowa likewise claimed; for, as pointed out by Mr. Justice Baldwin in classic terms, the States had renounced diplomacy as a means of producing agreement, and a resort to war to compel an agreement, inserting as a wedge the Supreme Court between the contending parties in order that justice might be done without unworthy intrigue, on the one hand, and open force, on the other.

A boundary dispute.

Because of these things the State of Missouri resorted to the Supreme Court 'with the consent of the State of Iowa', to quote the language of the report, 'in order

Suit filed with the consent of Iowa.

to settle a controversy which had arisen respecting the true location of the boundary line which divided the two States.[1]

As the question is one of fact, depending upon the lines to be drawn in accordance with the statutes fixing the boundaries between the State of Missouri, on the one hand, and the territory to the north, which later became the State of Iowa, it does not seem necessary to consider arguments of counsel or to dwell at length upon the contentions of the States, but rather upon the means taken by the States to ascertain the boundaries and the decree of the Court directing that the lines be drawn in accordance with the true intent of the statutes by commissioners appointed by the court, and the boundaries thus determined marked by visible and permanent monuments.

Jurisdiction of the Court not disputed.

It is not necessary to consider the question of jurisdiction, as it was settled in the boundary dispute between Rhode Island and Massachusetts—so settled, indeed, that neither State contested it—and by agreement the States resorted to the court. As a matter of fact, each State appeared as a plaintiff, Missouri filing its bill against Iowa, setting forth its claim to boundary and asking to be quieted in possession of its territory by a decree of the court fixing the boundary in accordance with the contention of Missouri. The State of Iowa likewise filed its bill, called in such cases a cross-bill, against the State of Missouri, setting up its claim to the land in dispute and asking a decree of the court to quiet it in possession of this territory against Missouri.

The case was filed, as has been stated, in 1847. It came on for a hearing and was decided in the January term of 1849. Mr. Justice Catron delivered the opinion of the court, which was unanimous, Mr. Chief Justice Taney concurring, although, but three years before, in the case of *Rhode Island* v. *Massachusetts* (4 Howard, 591, 639) he had dissented on the ground that a question involving the sovereignty of two states was a political, not a judicial, question and therefore not contained in the grant of judicial power to the United States. Not merely the opinion but the language of Mr. Justice Catron will be heavily drawn upon. It was so full and complete as to free the reporter, no doubt to his great delight, from prefixing a statement of his own, and it has the advantage of authority, to which the reporter's words could make no claim.

Summary of the facts.

The reporter, however, found it necessary to explain the pretensions of the respective parties with reference to the map, and, for the reader's convenience, some observations will be premised on this phase of the subject. The State of Missouri, pursuant to the enabling act of Congress, adopted a Constitution in which the boundaries of the new state are described. In regard to the portion of territory in controversy the language of the Constitution is as follows :

> From the point aforesaid [from the middle of the mouth of the Kansas River where it empties into the Missouri] north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary line ; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said River Des Moines ; thence down along the middle of the main channel of the said River Des Moines to the mouth of the same, where it empties into the Mississippi River.[2]

In 1821 Missouri was admitted as a state with these boundaries, and, by act of

[1] *State of Missouri* v. *State of Iowa* (7 Howard, 660).
[2] *Ibid.* (7 Howard, 660).

Congress approved August 4, 1820, the southern boundary of Iowa was made identical with the northern boundary of Missouri.

It will be observed that a reference is made in the quoted portion of the Constitution of Missouri to the Indian boundary line. Regarding this, it is to be said in this connexion that, in 1816, prior to the passage of these various laws, commissioners were appointed on the part of the United States to settle with the Osage chiefs the boundary of the concession which the Osage tribe had just made to the United States, and that one Sullivan was appointed to run the line in accordance with the agreement, which not inappropriately bears his name. He began on the bank of the Missouri opposite the Kansas River and ran his line due north 100 miles, at which point he ran the line, as he thought, due east, but in fact north of east, until it struck the river Des Moines. It is obvious, without discussion, that, because of this deviation, the line was a little farther to the north than it should in fact have been.

In the passage from the Constitution previously quoted the line of latitude passing through the rapids of the river Des Moines ' making said line correspond with the Indian boundary line ' was to be the northern boundary of Missouri. It was natural, therefore, that Missouri should show a keen interest in the rapids of this river. It later located them at a point where no one else found them, a considerable distance to the north of the Indian line as drawn by Sullivan, and therefore a little farther north than the true Indian line. In accordance with the constitution this line, however, was made to run east and west, corresponding to the real Indian line. The nonexistent rapids were located by a man named Brown, appointed by Missouri, and the line which he drew, and which the State of Missouri claimed, is known in the controversy as the Brown line.

The State of Iowa was, like Missouri, interested in the rapids of the Des Moines River, because the northern boundary of Missouri was the southern boundary of Iowa. It was therefore to the interest of Iowa that these rapids should be as far south as practicable, and, curiously, that state discovered that they were not in the Des Moines River, as supposed, but, *mirabile dictu*, in the Mississippi, considerably below the point where Brown had ventured to locate them. Starting, therefore, from this line and running it west from the Des Moines River parallel to the Indian boundary, it was to the south of the true Indian line, to the south of the Sullivan line, and very much farther to the south of the Brown line.

Opinion of the Court.

' On the 10th day of December, A. D. 1847,' to quote the language of Mr. Justice Catron, ' the State of Missouri filed her original bill in this court, according to the third article and second section of the Constitution, against the State of Iowa, alleging that the northern part of said State of Missouri was obtruded on and claimed by the defendant, for a space of more than ten miles wide and about two hundred miles long ; and that the State of Missouri is wrongfully ousted of her jurisdiction over said territory, and obstructed from governing therein ; that the State of Iowa has actual possession of the same, claims it to be within her limits, and exercises jurisdiction over it, contrary to the rights of the State of Missouri, and in defiance of her authority.

' And the complainant prays, that, on a final hearing, the northern boundary-line of said State of Missouri (being the common boundary between the complainant and defendant) be, by the order of this court, ascertained and established ; and that the rights of possession, jurisdiction, and sovereignty to all the territory in controversy be restored to the State of Missouri ; that she be quieted in her title thereto ; and that

the defendant, the State of Iowa, be for ever enjoined and restrained from disturbing the State of Missouri, her officers and people, in the full possession and enjoyment of said territory, thus wrongfully held by the State of Iowa.' [1]

This is a very brief summary on the part of the court of very extensive pleadings, which, fortunately, for present purposes, are irrelevant, as Mr. Justice Catron's statement does ample justice to Missouri, and his equally brief statement of the claims of Iowa does justice to that State. Thus, he continues :

To this bill the State of Iowa answers. She denies the right claimed by Missouri ; alleges that Iowa has the sovereign authority to govern and hold the territory in dispute as part of her territory, the common line dividing the States being the southern part thereof ; and also prays, that the rights of the parties may be speedily adjudicated by this court, that the relief prayed by complainant may be denied, and that her bill be dismissed.

To the bill of Missouri Iowa files her cross-bill, charging Missouri with seeking to encroach on the territorial limits of Iowa to the extent aforesaid, and more ; prays, that, on a final hearing, a decree be made by this court, settling for ever the true and rightful dividing line between the two States ; that Iowa may be quieted in her possession, jurisdiction, and sovereignty up to the line she claims ; and that the State of Missouri be perpetually enjoined from exercising jurisdiction and authority, and from disturbing the State of Iowa, her officers and people, in the enjoyment of their rights on the north side of the true line.

To this bill the State of Missouri answers, and sets up in defence the same matters, set forth by her original bill.[2]

We thus have a summary statement of the claims of Missouri and of the counter claims of Iowa. To the cross-bill of Iowa, Missouri answered and set up in defence the matters stated in the original bill. Replications, that is to say, further answers to the answers made by each state, were filed. Thus, Mr. Justice Catron continues :

On these issues depositions were taken, on which, together with much of historical and documentary evidence, the cause was brought on to a hearing, and was heard with a most commendable spirit of liberality on both sides.[3]

With this touch of urbanity, often noted in cases between individuals and not out of place even between contending States, the learned Justice expresses the opinion of the Court on a matter of pleading, which was then of greater importance to the States than now, when the technicalities of equity pleading have been rejected by the rules of the Supreme Court promulgated in 1913. ' And we take occasion here to say,' the learned Justice proceeded, ' on a matter of practice, that bill and cross-bill is deemed the most appropriate mode of proceeding applicable to cases like the present, as it always offers an opportunity to the court of making an affirmative decree for the one side or the other, and of establishing by its authority the disputed line, and of having it permanently marked by commissioners of its own appointment, if that be necessary, as in this cause it is.' [4]

After thus stating the case made by the pleadings, and after having examined the various provisions of the statutes relating to boundary, while Missouri was a territory as well as a state ; and showing that the particular line drawn by the surveyor Sullivan, and therefore called the Sullivan line, was recognized by the United States, the learned Justice thus concluded this portion of his opinion :

[1] *State of Missouri* v. *State of Iowa* (7 Howard, 660, 666–7).
[2] *Ibid.* (7 Howard, 660, 667).
[3] *Ibid.* (7 Howard, 660, 667).
[4] *Ibid.* (7 Howard, 660, 667).

From these facts it is too manifest for argument to make it more so, that the United States were committed to this line when Iowa came into the Union. And, as already stated, Iowa must abide by the condition of her predecessor, and cannot now be heard to disavow the old Indian line as her true southern boundary.[1]

So much for this phase of the question. The State of Missouri, however, disavowed what the Court calls the old Indian boundary, and claimed that the line drawn from the Missouri River, admittedly the western boundary of the State, to the rapids in the Des Moines River, fixed as its northern boundary, should have been from a point in the Des Moines River farther to the north. It therefore commissioned a surveyor named Brown to draw this line, which he did, and by an act of the legislature of Missouri of 1839 this line was adopted as the northern boundary of the State, and therefore the southern boundary of Iowa, because the two States were contiguous, between a point in the Missouri River and a point called in the statute the rapids of the Des Moines River. Of this phase of the question—and it is of importance in the decision of the case—Mr. Justice Catron said :

On the rapids selected by the commissioners, and on Brown's line, the bill of complaint of the State of Missouri is altogether founded ; and if she fails in establishing the proper place of beginning, she has no case, and must go out of court as a complainant, and can have no relief further than an injunction to restrain Iowa from obtruding on her jurisdiction south of the true line, wherever it may be found, should Iowa attempt to go south of such line.[2]

Mr. Justice Catron next proceeds to examine the location of the rapids, and from an examination of surveys made by competent engineers comes to the conclusion that there was no portion of the river which could be properly called, or was actually known as ' the rapids ' ; so that the boundary line could not properly be made to depend upon and be drawn from a non-existent natural object :

There is none such in the Des Moines River, and therefore Brown's line cannot be upheld, nor the claim of Missouri be supported.[3]

In view of these facts, the learned Justice stated on behalf of his brethren, and with this he concluded his opinion :

Boundary line settled by the Court.

This court is, then, driven to that call in the constitution of Missouri which declares that her western boundary shall correspond with the Indian boundary-line ; and, treating the western line of a hundred miles long as a unit, and then running east from its northern terminus, it will supply the deficiency of a call for an object that never existed. Nor has Missouri any right to complain. She herself, for ten years and more after coming into the Union, recognized the Indian lines west and north as her proper boundary ; her counties were extended up to these lines before the present controversy arose ; and so counties in the territory north were established up to this recognized line without objection on the part of Missouri. And when Congress ceded to Missouri the country west of Sullivan's line, both parties to that cession acted on the assumption, that the ceded territory next the Missouri River was bounded on the north by a line that should be run due west from the northwest corner of the old Osage boundary. To this extent the Indian title was extinguished, and to no other extent did the United States cede that country. Nor could this court act otherwise than to reject the claim of Missouri, without doing palpable injustice to the United States on the western part of the line.

We are, therefore, of opinion, that the northern boundary of Missouri is the

[1] *State of Missouri* v. *State of Iowa* (7 Howard, 660, 674).
[2] *Ibid.* (7 Howard, 660, 675).
[3] *Ibid.* (7 Howard, 660, 676).

Osage line, as run by Sullivan in 1816, from the northwest corner made by him to the Des Moines River ; and that a line extended due west from said northwest corner to the Missouri River is the proper northern boundary on that end of the line. And this is the unanimous opinion of all the judges.[1]

The opinion, valuable and interesting in itself, is to be taken as an explanation of the decree, which is the veritable decision of the court. The decree finds that the Sullivan line had been recognized by Missouri and by the United States, from which Iowa derived its title, and that, therefore, the Sullivan line was to be taken as the proper northern boundary. In 1836 Congress had, at the request of Missouri, added the territory to the west of the Sullivan line, drawn due north from the point where the Kansas River empties into the Missouri River, and the decree, in order to settle any dispute that might arise in the future, provided 'that a line prolonged due west from Sullivan's northwest corner, on a parallel of latitude to the middle of the Missouri River is the true northern boundary of the State of Missouri, on this part of the controverted boundary'.

After having declared the Sullivan line to be the boundary between the states, prolonging it west to the middle of the Missouri River, and making the line thus extended the northern boundary of Missouri and the southern boundary of Iowa, the decree continued, in terms interesting to partisans of judicial settlement :

Injunctions granted against both parties.

And it is further adjudged and decreed, that the State of Missouri be, and she is hereby, perpetually enjoined and restrained from exercising jurisdiction north of the boundary aforesaid dividing the States ; and that the State of Iowa be, and she hereby is, also perpetually enjoined and restrained from exercising jurisdiction south of the dividing boundary established by this decree.[2]

Commissioners appointed to draw and mark the line.

As, however, the Sullivan line was not clearly marked, or was obscured by time, commissioners were appointed to draw and to mark the line, following the *obiter dictum* of Mr. Justice Washington in the case of *Fowler* v. *Lindsey* and *Fowler* v. *Miller* (3 Dallas, 411), decided in 1799, which cases, it will be remembered, gave rise to the first suit between States in the Supreme Court of the United States. The opinion of Mr. Justice Washington, irrelevant in that case, was correct, and, as often happens, the *obiter dictum* of a carefully considered case becomes the basis of judgement of a future and no less carefully considered one. Because of this, his language is of importance and the material portion of it is quoted as follows :

The State of *New-York* might, I think, file a bill against the State of *Connecticut* praying to be quieted as to the boundaries of the disputed territory ; and this Court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries.[3]

Landmarks to be erected.

By agreement of the parties the court appointed two commissioners to run and remark the line, directing them 'to plant at said north-west corner a cast-iron pillar, four feet six inches long, and squaring twelve inches at its base, and eight inches at its top ; such pillar to be marked with the word " Missouri " on its south side, and " Iowa " on the north, and " State Line " on the east side ; which marks shall be strongly cast into the iron. And a similar pillar shall be by them planted in the line near the bank of the Des Moines River, with the mark of " State Line " facing the west. And also a similar one, near the east bank of the Missouri River,

[1] *State of Missouri* v. *State of Iowa* (7 Howard, 660, 677). [2] *Ibid.* (7 Howard, 660, 679).
[3] *Fowler* v. *Lindsey* (3 Dallas, 411, 413).

shall be planted by the said commissioners in the said line, the mark of "State Line" facing the east'.[1]

It is not improper to observe how easily and simply the Court marked the boundary, not by fortifications bristling with cannon, but by simpler and less expensive monuments, as is the wont of Courts and is to be expected in judicial settlement.

Commissioners to report to the Court.

It was further ordered that a certified copy of the decree was to be forwarded by the clerk of the Court to the Governors of the States of Missouri and of Iowa and also to the commissioners, who were ordered 'to make report to this court, on or before the first day of January next, of their proceedings in the premises, with a bill of costs and charges annexed'.[2] The Chief Justice was empowered by the Court to appoint other commissioners in case of death or inability to perform the duties required by this decree, to increase the number of commissioners should he deem it advisable, and he was finally authorized, in vacation, 'to make such orders and give such instructions, as this court could do when in session'.[3]

17. State of Missouri v. State of Iowa.

(10 Howard, 1) 1850.

Report confirmed by the Court, 1850.

Thus the first phase of this controversy ended. The commissioners appointed by the Court to run and mark the boundary line between the States of Missouri and Iowa performed their duty, and made their report to the Court at the December term of 1850, from which it appears 'that two surveyors had been employed by said commissioners to aid them in doing the work in the field; and that other assistants had been employed, and that various expenses had been incurred in running and marking said line'.[4] To estimate these expenses, the clerk of the court was ordered to 'examine witnesses, and resort to other evidence, for the purpose of ascertaining what is the proper compensation to be allowed to said commissioners and the surveyors they employed'. The clerk was also directed to 'ascertain the amount of expenses, of every description, incurred by said commissioners, besides the compensation to themselves and said surveyors, together with the costs and charges incurred in this court in carrying on the controversy here'. The clerk was instructed to take the report of the commissioners on these matters 'as *prima facie* true', and to ascertain the amount of moneys advanced to the commissioners by the states of Missouri and Iowa, respectively, and the manner in which the moneys had been expended. On January 3, 1851, the cause came on for further order and decree, when the reports of the commissioners, of the surveyors, and of the clerk, and the report of the commissioners appointed by the court under the decree in the first phase of this case were presented, found to be true, and approved, and were adopted and confirmed and the boundary line finally established.[5]

Costs to be shared equally.

In the portion of the decree of the court relating to expenses, the clerk was allowed for his services, past, present, and future, in connexion with this case, the sum of $162.27. In addition to the advances made by the States, it appeared that the total expenses of the survey amounted to $10,880.41, and that of this sum each party to

[1] *State of Missouri* v. *State of Iowa* (7 Howard, 660, 679–80).
[2] *Ibid.* (7 Howard, 660, 680).
Ibid. (10 Howard, 1).
[3] *Ibid.* (7 Howard, 660, 680).
[5] *Ibid.* (10 Howard, 1, 2).

the controversy had advanced $2,000. In addition, as each state was to pay half of the expenses, the court taxed the State of Missouri and the State of Iowa with the payment of the sum of $3,514.76½, out of which the commissioners were to satisfy the expenses of the proceedings.[1]

Courts are not bankers, but they are careful of the pennies and look upon themselves as trustees rather than as parties to the case. It appeared that certain instruments had been purchased by the commissioners and were held by them subject to the order of the court. It was therefore ordered by this tribunal that 'the commissioners dispose of the said instruments at such times and places, and on such terms, as to them may seem most advantageous to the interests of the parties in this suit', and that they 'pay the proceeds of the sale into the treasuries of the said States of Missouri and Iowa, respectively, that is to say, one-half of the proceeds into each treasury, and take receipts from the proper officers for the moneys paid'.[2]

The commissioners were ordered to report to the next term of the court the manner in which they had executed the duties imposed upon them, and for this purpose the cause was kept open and the clerk of the Court, as in the previous case, was ordered to transmit to the Governors of Iowa and of Missouri copies of the decree 'including the reports of the commissioners, surveyors, and clerk, together with a copy of the field notes of said surveyors, duly authenticated under the seal of this court'.[3]

18. State of Florida v. State of Georgia.

(11 Howard, 293) 1850.

Motion for leave to file a bill.

The first phase of this case is very brief and is an introduction to the second phase. Yet it is to be regarded as a separate and distinct suit. It is reported as such, although it is naturally and in fact introductory to an interesting, elaborate, and important controversy between the two States, to which, in the second phase, the United States intervened and became a party. For the present purpose it is sufficient to say that Messrs. Johnson & Westcott, solicitors for Florida, moved for leave to file a bill of complaint and for a writ of *subpoena* 'or such process as to the court may seem proper'. On this meagre statement of affairs, the Court was in doubt as to the order it should render, and therefore took it under advisement.

Subpoena granted.

By the next day, however, the Court had made up its mind, and, following the rule of safety, took the usual course in such cases, ordering that the bill of complaint be filed, that process of *subpoena* be awarded as prayed for, and that such process issue against the State of Georgia.

19. State of Florida v. State of Georgia.

(17 Howard, 478) 1854.

The process awarded in the first phase of *Florida* v. *Georgia* (11 Howard, 293) was duly served upon the Governor and Attorney-General of the defendant State, which answered; and other proceedings in due course were had. But before the case was at issue, and before all the evidence taken upon which the parties to the original suit proposed to rely, a very extraordinary event happened, which introduced

[1] *State of Missouri* v. *State of Iowa* (10 Howard, 1, 51, 53).
[2] *Ibid.* (7 Howard, 1, 53).
[3] *Ibid.* (7 Howard, 1, 53).

a new party to the controversy, and which makes of it a precedent and a point of departure. This new party was the United States, which, by its Attorney-General —admittedly the ablest of a long line of able representatives, Caleb Cushing by name, appeared and filed an information, moving at the same time for leave to intervene on behalf of the United States. Mr. Cushing informed the court that the United States was interested in the controversy between the plaintiff and defendant, inasmuch as it claimed the portion of territory in dispute as the public domain of the United States; and because of this fact, Mr. Cushing, in his own behalf and in behalf of the United States, moved the court that he be permitted to appear in the case and that he be heard on behalf of the United States at such time and in such form as the Court should order.[1]

Intervention of the United States.

It was not doubtful that the United States could sue in the Supreme Court, because an express provision of the Constitution gave it that right, but the United States had not heretofore asserted the right to sue a State of the Union. It did not raise that point in this proceeding, although it seemed to be involved, inasmuch as the Attorney-General did not ask to be a party to the extent of praying relief against one or the other of the states, or to the extent of having a judgement entered against it. He only asked the right to intervene in order to disclose the interest of the United States in the controversy, reserving the right to take such further action as might seem advisable in the premises. From this point of view the United States was not to be considered as plaintiff or defendant, and yet, if the United States could not be a plaintiff or defendant in the case, it seems difficult to support its intervention in a proceeding to which only States could be parties.

As was natural, Mr. Cushing appeared in defence of his motion, and as was also natural under the circumstances, defendant and plaintiff appeared to oppose the motion, as the original controversy was one to which alone they were parties and in which they were primarily interested. However, before taking up the question of jurisdiction, it is advisable to mention briefly the controversy between the States.

A boundary dispute.

In its bill Florida alleged that the portion of the boundary line in dispute should run from the junction of the Flint and Chattahoochee rivers, and thence in a straight line to Ellicott's Mound, situated at the assumed head of the River St. Mary's. The State of Georgia likewise agreed with Florida that this portion of the boundary in controversy should begin at the junction of the Flint and Chattahoochee rivers, but, instead of running to Ellicott's Mound, it should run to a point called Lake Spalding or a point called Lake Randolph.

Now Lake Randolph and Lake Spalding are situated about thirty miles to the south of Ellicott's Mound, the effect whereof, in the opinion of Mr. Cushing, would be, if the contention of Georgia were sustained, to transfer to that State a tract of land in the shape of a triangle with a base of thirty miles and equal sides of about a hundred and fifty miles in length, containing some 1,200,000 acres of land, all of which had heretofore been considered and treated as the public domain of the United States, and surveyed as such, and much of which had been sold and patented by the Government as of the territory of East Florida acquired from Spain.[2]

There was no precedent for the intervention of the United States, a fact which did not disconcert Mr. Cushing, who relied upon the English case of *Taylor* v. *Salmon*

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 480).
[2] *Ibid.* (17 Howard, 478, 479).

(4 Mylne and Craig, 134, 141), decided in 1883, in which Lord Cottenham was reported as saying that it was the duty of the court of chancery ' to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise ; and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy '. The English authority was apposite and in strict accord with the practice of the Supreme Court in suits between States, in which the rules of equity were modified so as to adapt them to the changed conditions of the parties as well as to the changed circumstances of the cases themselves. Mr. Cushing therefore contended that the absence of a precedent for the appearance of the United States in a suit between States was not fatal, as the Supreme Court, creating a precedent in the case of the States, could assuredly create a precedent in the case of the United States to protect its interest, if necessary.

Grounds for intervention of the United States.

Leaving this phase of the question, Mr. Cushing insisted that the United States should not appear in the name of the State of Florida, for a variety of reasons ; for if the appearance of the United States depended upon the consent or discretion of Florida, or of any other State, like circumstanced, the withdrawal of the consent would deprive the United States of its right to appear. The United States ought to appear in its own behalf and in self-defence, and it was for the United States to decide when its interest requires that it appear. Although in the present instance Florida had called the suit to the attention of the United States and asked the General Government to intervene, a case might arise in which the intervention of the United States would be opposed to the interests of the parties, and therefore its intervention would not be requested.

United States grants in question.

Mr. Cushing further stated, in support of this contention, that the United States had granted certain lands by patents to individuals, or by statute cession to Florida, which, if the claim of Georgia be sustained, belonged to that State and not to the United States. But in this case the United States was responsible to its grantees. It therefore appeared in its own interest as warrantor of title. It also had an interest that the controversy between the two States be fully and well tried and that the case, properly presented, be disposed of upon its merits. Then, too, he called attention to that clause of the Constitution forbidding a State to be erected within the jurisdiction of another State, or the formation of any State by the junction of two or more States or parts of States without the consent of the legislature of the States as well as of the Congress. He also called attention to a related clause of the Constitution, forbidding a State, without the consent of Congress, to enter into any agreement or compact with another State. He maintained that the States could not change their common boundary without the consent of Congress, and that the United States had an interest in the question of boundaries, as the transfer of sovereignty, directly or indirectly, affected the Congress and affected all departments of the Government. He suggested that treaty rights might be involved, also that special acts of Congress could be called in question. These reasons would, in Mr. Cushing's opinion, justify the intervention of the United States. But, as previously stated, he was unwilling to have the United States become a plaintiff as a party of record, or to have a judgement against the United States as a party defendant. ' The attorney-general, in proposing

Constitutional arguments.

The United States does not wish to be a party.

to intervene here to protect the interests of the United States,' to quote the language of the report, ' desires to do so, not as a technical party ; not as joining with the one or the other party ; not in subordination to the mode of conducting the complaint or defence adopted by the one State or by the other, not subject to the consequences of their acts, or of any possible mispleading, insufficient pleading, omission to plead, or admission or omission of fact by either or both ; but free to co-operate with, or to oppose both, or either, and to bring forth all the points of the case according to its own judgement, whether as to the law or to the facts ; for *ex facto oritur jus*.' [1]

Mr. Cushing stated that the change of boundary might affect the interest of the United States, and insisted that the United States should not be prejudiced by mistakes in the conduct of the case, which it could not correct if it did not intervene. He also called attention to the fact that the public lands within the State of Florida were reserved to the United States without taxation by the State, and that, if that portion of Florida were declared to belong to Georgia, the United States might be prejudiced because of the transfer of the sovereignty ; and that, finally, it was not impossible that the two States might ' by their own acts, by pleadings, or their agreement entered of record in the suit, change the true and lawfully established boundary between them to the direct prejudice of the interests, rights, and laws of the United States '.[2]

The burden of proof was upon Mr. Cushing to support the motion which he had made, and the main lines of his argument have been stated in order to disclose its nature. It does not seem to be necessary to follow counsel in their contentions, as all aspects of the case are dealt with in the opinion of the Court and in the dissenting opinions of Justices Curtis and Campbell. The Chief Justice, after stating the motion of the Attorney-General for leave to be heard in behalf of the United States in the boundary dispute between the two States, proceeds to state briefly what the Court considered to be the facts and the ground for the motion, saying on this point :

Decision of the Court admitting the intervention.

The attorney-general has filed an information, stating that the United States are interested in the settlement of this line ; that the territory in dispute contains upwards of one million two hundred thousand acres of land, and was ceded to the United States by Spain as a part of Florida ; and that the United States have caused the whole of it to be surveyed as public land and sold a large portion of it, and issued patents to the purchasers. And upon these grounds he asks leave to offer proofs to establish the boundary claimed by the United States, and to be heard, in their behalf, on the argument.[3]

The Chief Justice calls attention to the fact that the motion was resisted by Florida and Georgia and that the question was very fully argued by counsel of the respective parties. He next says that the Court had taken time to consider, as it was in some degree a new question, and that it concerned ' rights and interests of so much importance '.

The meaning of the Chief Justice that the case was in some respects new was due to the fact that it is familiar practice for the Court to hear the Attorney-General in suits between individuals, upon the suggestion that public interests are involved in the decision, and in such cases the Attorney-General is heard not for or against one

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 482–3).
[2] *Ibid.* (17 Howard, 478, 483).
[3] *Ibid.* (17 Howard, 478, 491).

of the parties to the record but in behalf of the United States and as representing its interests. The Chief Justice, in support of his statement, referred to the appearance of the Attorney-General on several occasions during the last term of court, where the United States had sold lands as a part of the public domain claimed by individuals under grants alleged to have been made by France or Spain, previous to the cession of the territories in which they were situated, to the United States. The Chief Justice, therefore, was assuredly justified in saying as he did, that 'if the motion was merely to be heard at the argument, there would, we presume, have been no opposition to it on the part of the States '.[1]

Claim of the United States to bring evidence without being a party.

In his desire to do justice to the States, Mr. Chief Justice Taney adverts to another difference between the past and the proposed intervention, for the cases in which the Attorney-General thus appeared were argued upon the evidence produced by the respective parties and no new evidence was offered on behalf of the United States ; whereas, in the present occasion, the Attorney-General reserved the right to take such action as would be in the interest of his illustrious client, including the production of evidence. This was the part of the question which the Chief Justice considered in some degree as new. Only a party to the record could introduce evidence, and the United States could not be permitted to do so unless it became a party of record ; and to this the States in controversy objected, inasmuch as they contended that the United States could not, under the clause of the Constitution permitting suits between States, become a party to a controversy between two states of the American Union.[2]

The court, recognizing in this a question of jurisdiction, proceeded to consider this objection ; because, if well founded, the motion of the Attorney-General could not prevail. Mr. Chief Justice Taney first mentions that the Constitution confers on the Supreme Court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, and he adds that it is settled by repeated decisions—and, he might have added, over his protest—that a question of boundary between States is within the Constitutional grant of judicial power and that the Supreme Court can take original jurisdiction of controversies of this nature between the States.

After this statement the Chief Justice considers a question which is of very great importance, and which cannot be too often dwelt upon, that the power to assume jurisdiction and to regulate its procedure to give effect to the power, is inherent in a court of justice and will be exercised according to its sound discretion, without a provision in the Constitution and without a statute defining it. His language on this point is :

Procedure is within the discretion of the Court.

But the Constitution prescribes no particular mode of proceeding, nor is there any act of congress upon the subject. And at a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous act of congress regulating the process and mode of proceeding. But the court, upon much consideration, held, that although congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred ; that it was a duty imposed upon the court ; and in

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 491).
[2] *Ibid.* (17 Howard, 478, 491).

the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.[1]

That this was so in the case of individuals was not doubted, for individuals, in countries where courts obtain, are accustomed to rules of court and would be astonished if the court should fail to administer justice on the ground that it did not possess the power to frame rules for its administration in cases where it possessed undoubted jurisdiction. But unaccustomed to suits between States, and without precedent and without procedure, counsel and the States, particularly the defendant, doubted the power of the Court to frame its procedure. However, if precedents did not exist, analogies did, and the Court, under argument of counsel and with the concurrence of the States, has drafted a form of procedure which has stood the test of time and the stress of controversy. Thus, Mr. Chief Justice Taney said :

There was no difficulty in exercising this power where individuals were parties ; for the established forms and usages in courts of common law and equity would naturally be adopted. But these precedents could not govern a case where a sovereign State was a party defendant. Nor could the proceedings of the English chancery court, in a controversy about boundaries, between proprietary governments in this country, where the territory was subject to the authority of the English government, and the person of the proprietary subject to the authority of its courts, be adopted as a guide where sovereign States were litigating a question of boundary in a court of the United States. They furnished analogies, but nothing more. And it became, therefore, the duty of the court to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.[2]

Mr. Chief Justice Taney thereupon refers to the practice of the Supreme Court in such matters, in a very brief passage, which, as it is as material to his argument as previous passages quoted, is stated in his own words :

It is upon this principle that the court appears to have acted in forming its proceedings where a State was a party defendant. The subject came before them in *Grayson* v. *Virginia*, 3 Dall. 320. And the court there said that they adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable. And they at the same time passed an order directing process against a State to be served on the governor or chief magistrate, and the attorney-general of the State. This was in 1796. And the principle upon which its process was then framed, as well as the mode of service then prescribed, has been followed ever since, with this exception, that in subsequent cases the chancery practice, and not the admiralty, is regarded as furnishing the best analogy. But the power and propriety of deviating from the ordinary chancery practice, when the purposes of justice require it, have been constantly recognized ; and were distinctly asserted in the case of *Rhode Island* v. *Massachusetts*, 14 Pet. 247, and again in the same case, in 15 Pet. 273, and was recognized in the case of *New Jersey* v. *New York*, 5 Pet. 289.[3]

The Court can modify the practice to meet new cases.

The purpose which the Chief Justice had in the above observations is evident, without argument. The practice of the past was to be followed in so far as it was

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 492).
[2] *Ibid.* (17 Howard, 478, 492).
[3] *Ibid.* (17 Howard, 478, 492).

applicable. It was to be modified to meet changed conditions, and the absence of a precedent admitting the United States to interpose an allegation of an interest in a controversy between two States was not to be fatal to the admission of the United States if it were otherwise proper that the United States should intervene. Proceeding to apply these principles, the Chief Justice said, on behalf of the court :

The United States deeply interested.

It is manifest, if the facts stated in the suggestion of the attorney-general are supported by testimony, that the United States have a deep interest in the decision of this controversy. And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded. And if this were a suit between individuals, in a court of equity, the ordinary practice of the court would require a person standing in the present position of the United States, to be made a party, and would not proceed to a final decree until he had an opportunity of being heard.[1]

Again we are confronted with the right of private parties, claimed by the plaintiff to be applicable to States and resisted by the defendant, either because it is a State or because the right might prove to be prejudicial to its interests. In the present instance the States interposed the terms of the Constitution, which, in their opinion, prevented the United States being made a party in an original proceeding in the Supreme Court between States. This was the broad objection going to the root of the matter, for if the United States could not be made a party it was the end of the motion. Lest the Court might rule against them on this point they insisted that, in any event, the Attorney-General did not possess the power by virtue of his office to make them defendants without an act of Congress authorizing it. They had thus two strings to their bow.

From what has already been said in the passages quoted from the opinion of the Chief Justice, it would be safe to assume that he would not allow technicalities based upon English practice to stand in the way. It was also evident that he would not be inclined to deny to the United States the right to resort to the Supreme Court in a case properly before it, in which a failure to resort to the Court might prejudice the United States, which not only is to be considered as a state—as its very title shows—but as a trustee of all the states, including therein the plaintiff and defendant to this controversy. But to return to the opinion of the Chief Justice, who expressly says on this point :

We do not, however, deem it necessary to examine or decide these questions. They presuppose that we are bound to follow the English chancery practice, and that the United States must be brought in as a party on the record, in the technical sense of the word, so that a judgment for or against them may be passed by the court. But, as we have already said, the court are not bound, in a case of this kind, to follow the rules and modes of proceeding in the English chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained.[2]

After having stated this general principle, he thus draws the appropriate, indeed we may say the inevitable, consequences from it :

It is evident that this object can be more conveniently accomplished in the mode adopted by the attorney-general, than by following the English practice in

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 493).
[2] *Ibid.* (17 Howard, 478, 493).

cases where the government have an interest in the issue of the suit. In a case like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the court, in the present suit, there is no possible mode by which the decision can be reviewed or reëxamined at the distance of the United States. They would therefore be as effectually concluded by the judgment as if they were parties on the record, and a judgment entered against them. The case, then, is this: Here is a suit between two States, in relation to the true position of the boundary line which divides them. But there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court. For their interests may be different from those of either of the litigating States. And it would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case, and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the constitution, become a party to this suit, in the legal sense of that term, and the English mode of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice.

The United States represents all the remaining States.

Indeed, unless the United States can be heard in some form or other in this suit, one of the great safeguards of the Union, provided in the constitution, would in effect be annulled.

The Chief Justice advanced as an additional, and indeed as a conclusive, reason for the intervention of the United States, that a failure to do so would annul one of the great safeguards of the Union, which he found in the tenth section of the first article of the Constitution, by which the States renounced the right to enter into an agreement or compact with another state without the consent of Congress. This they could not directly do by negotiation; but inasmuch as a question of boundary is a judicial question because it is submitted to the Supreme Court, it would be possible for two States to frame their pleadings in such a way as indirectly to accomplish in a proceeding in Court what they could not otherwise bring about. On this point the Chief Justice was very firm and sure of his ground.

Possibility of evading the rule against agreements between States without the consent of Congress.

But, under our government, a boundary between two States may become a judicial question, to be decided in this court. And, when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and that decision, when pronounced, is conclusive upon the United States, as well as upon the States that are parties to the suit. Now, as in a case of compact, it is, by the constitution, made the duty of the United States to examine into the subject, and to determine whether or not the boundary proposed to be fixed by the agreement is consistent with the interests of other States of the Union; it would seem to be equally their duty to watch over these interests when they are in litigation in this court, and about to be finally decided. And, if such be their duty, it would seem to follow that there must be a corresponding right to adduce evidence and be heard, before the judgment is given. For this is the only mode in which they can guard the interests of the rest of the Union, when the boundary is to be adjusted by a suit in this court. For, if it be otherwise, the parties to the suit may, by admissions of facts and by agreements admitting or rejecting testimony, place a case before the court which would necessarily

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 493–4).

be decided according to their wishes, and the interest and rights of the rest of the Union excluded from the consideration of the court. The States might thus, in the form of an action, accomplish what the constitution prohibits them from doing directly by compact. Nor is this intervention of the United States derogatory to the dignity of the litigating States, or any impeachment of their good faith. It merely carries into effect a provision of the constitution, which was adopted by the States for their general safety ; and, moreover, maintains that universal principle of justice and equity, which gives to every party, whose interest will be affected by the judgment, the right to be heard.[1]

We are therefore prepared for what may be considered as the final phase of this part of the case ; for after the decision to allow the Attorney-General to intervene on behalf of the United States there were further proceedings at the request of the parties. The holding of the court, therefore, in the language of the Chief Justice, on this point was :

The United States may intervene without becoming a party.

Upon the whole, we think the attorney-general may intervene in the manner he has adopted, and may file in the case the testimony referred to in the information, without making the United States a party, in the technical sense of the term ; but he will have no right to interfere in the pleading, or evidence, or admissions of the States, or of either of them. And, when the case is ready for argument, the court will hear the attorney-general, as well as the counsel for the respective States ; and, in deciding upon the true boundary line, will take into consideration all the evidence which may be offered by the United States, or either of the States. But the court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant ; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor.[2]

From this judgement Mr. Justice McLean, Mr. Justice Daniel, Mr. Justice Curtis, and Mr. Justice Campbell dissented, the last two delivering dissenting opinions.

After the decision to allow the Attorney-General on behalf of the United States to intervene had been decided, counsel on behalf of Florida moved for leave to take out motions to examine witnesses in the case, saying in support of the motion :

That (the consent of the state of Florida being hereby given thereto) the attorney-general of the United States may, in behalf of the United States, use the name of said complainant whenever he may deem it advisable that the United States should sue out any commission, to take any testimony or procure any proofs in said cause ; he giving notice thereof to the solicitors or counsel for said parties, as aforesaid.[3]

This motion was opposed by counsel for Georgia, who moved ' to appoint a commissioner and surveyor to survey the premises in dispute, and take testimony and report to the court '.[4] This motion was opposed by Florida, and after argument Mr. Chief Justice Taney, on behalf of the Court, impartially overruled each of the motions, stating that each of the States should conduct its own proceedings ; that the Attorney-General only appeared for the United States in the name of the United States and with reference to its interest in the controversy. In regard to the motion of the State of Georgia he stated the opinion of the Court to be that each party to the controversy is at liberty to cause surveys to be made and maps prepared and filed

Each party must conduct its own case.

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 494–5).
[2] *Ibid.* (17 Howard, 478, 495). [3] *Ibid.* (17 Howard, 478, 523). [4] *Ibid.* (17 Howard, 478, 523).

by such person as the States may select ; or, if they choose, they may agree on one person and jointly appoint him. The court refused, however, itself to appoint one or more persons to make the surveys and examinations, as officers of the court, believing that the case would better be brought before them by leaving each state to act for itself.[1]

From the opinion of Mr. Chief Justice Taney, who from his expression of views in the series of controversies between Rhode Island and Massachusetts might have been expected to dissent, but who apparently had had a change of judgement if not of heart, four Justices, Messrs. McLean, Daniel, Curtis, and Campbell, dissented. Two, Mr. Justice Curtis, with whom Mr. Justice McLean concurred, and Mr. Justice Campbell, on his own behalf, delivered dissenting opinions.

Dissenting opinions.

The opinion of Mr. Justice Curtis is based upon the fact that the intervention of the Attorney-General makes the United States a party to the controversy, and that to allow the United States to intervene without making it a party plaintiff, and without permitting it to obtain a decree or judgement, if such should be necessary to the preservation of its rights, was to deprive it of the necessary, natural, and proper consequence of its intervention in the suit between the States.

Admitting that, in suits between States, technicalities were not allowed to stand in the way of justice, Mr. Justice Curtis nevertheless insisted that, according to the common law and equity adopted by the Constitution of the United States, the intervention of the United States made it a party, with all the rights and privileges thereof, saying on this point :

> With submission to a majority of my brethren, I confess it seems to me that to deprive a party of some rights which, under all systems of law known to us, are deemed essential, while other rights are allowed to him which can be conceded only to a party to the controversy, proves the embarrassment which was felt in carrying out the idea of making him a party, but does not overcome the difficulty or even avoid it. It appears to me to declare, in effect, justice requires that you should be admitted as a party on this record ; but, in order to make some distinction between yourself and other parties, you shall not enjoy all the rights of a party ; and the particular rights which you are not to enjoy are, the power of excepting to the pleadings and proofs of the other parties.
>
> This is not satisfactory to my mind. Whether I consider only the substantial relations of the United States to the controversy, or the analogous provisions of positive or customary law in our own and other countries, I cannot avoid the conclusion that if they are admitted upon this record to assert their rights—to show what they are, and how they are involved in this controversy ; to maintain them, in the regular course of judicature, by allegation, proof, and argument, against the state of Georgia ; to have the process of the court to enable them to do so ; to profit by the decree if favorable, to lose by it if adverse—they are a party to this controversy, within the meaning of the constitution of the United States. And this raises the question, which in my opinion is a very grave one, whether the constitution permits the United States to become a party to a controversy between two states, in this court ? [2]

After stating that the Supreme Court is one of limited powers and that the United States is not enumerated among the parties entitled to invoke the original jurisdiction of the court, Mr. Justice Curtis then goes on to say that this line of

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 524).
[2] *Ibid.* (17 Howard, 478, 504).

reasoning excludes the United States from being a party to a controversy with a State in the Supreme Court :

The United States is a government acting on individuals.

But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the constitution pledges the power of the nation to guarantee to every State a republican form of government ; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts forms no exception to the general proposition, that the constitution confers on the United States powers to govern the people, and not the states.

There is, therefore, nothing in the general plan of the constitution, or in the nature and objects of the powers it confers, or in the relations between the general and State governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States. On the contrary, the agency of courts to compel the States to obey the laws of the Union, or to concede to the United States its rights or claims, would naturally be deemed both superfluous and impolitic ; superfluous, because the States can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are supreme, and in the courts of the United States, which have jurisdiction to enforce all laws of the United States ; and impolitic, because calculated to provoke irritation and resistance, and to excite jealousy and alarm.

It must be remembered, also, that a State can be sued only by its own consent. This consent has been given in the constitution ; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a state has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. The State of Georgia has consented to be sued by one or more States, or by a foreign state, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign state, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly, there is no power existing in this government to enlarge that consent so as to embrace in it any thing to which it does not, by its terms, extend.[1]

It is to be observed, in this connexion, that while the argument of Mr. Justice Curtis is very strong, that it has not met with the favour of the Court of which he was one, and the keenest and ablest of members. As will appear subsequently, it is in conflict with *United States* v. *North Carolina* (136 U.S. 211), decided in 1890, where the controversy was not raised, and in *United States* v. *Texas* (143 U.S. 621), decided in 1892, in which the question of jurisdiction was raised, argued and debated—in which, however, Mr. Chief Justice Fuller delivered a dissenting opinion, in which Mr. Justice Lamar concurred.

The gladsome light of jurisprudence, to use an expression of my Lord Coke, is not merely a steady, it is a great and organic flame.

Mr. Justice Campbell dissented for himself. After stating that it was inherent in sovereignty not to be sued without its consent, and reinforcing this elementary principle by quotations from the Federalist, No. 81, and from the language of James

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 506–7).

Madison, Patrick Henry, and John Marshall in the Virginia Convention to the same effect, and after relating the circumstances which led to the repudiation by the 11th amendment of the extension of the judicial power to suits between citizens of one State and another State of the Union, Mr. Justice Campbell maintained, in clear and unequivocal terms, that the intervention of the United States in the controversy between Florida and Georgia would impute a consent of the State of Georgia to be sued in a case in which it had not consented, inasmuch as a grant in derogation of right is to be strictly construed and not to be extended beyond its express terms.

The opinion of Mr. Justice Curtis may be said to have been to the same effect, but it was, in comparison, a denial with submission to the better judgement of his brethren ; that of Mr. Justice Campbell was a denial of consent, requiring an amendment of the Constitution to overcome his judgement ; for he said :

The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit between two or more States ? The constitution does not mention such a case. There were before the federal convention propositions to extend the judicial powers to questions 'which involve the national peace and harmony' ; 'to controversies between the United States and an individual State' ; and in the modified form, 'to examine into and decide upon the claims of the United States and an individual State to territory'. None were incorporated into the constitution, and the last was peremptorily rejected. The jurisdiction of this court over cases to which the United States and the States are respectively parties, is materially different—the one original, the other appellate only. There was no encouragement, nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the federal legislation naturally inspires a sentiment in favor of the federal authority. These operative causes of bias were known ; and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat, that the enumeration of the parties in this article of the constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause authorizing suits between two or more States afford any contradiction to this conclusion.

The articles of confederation, by which they were then combined, allowed congress, as the occasion might arise, to appoint special tribunals 'to which all disputes and differences now subsisting, or that might hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever', should be submitted.

Similar provisions for special and occasional tribunals, in matters of jurisdiction and boundary, formed a part of the plan of the constitution till near the close of the convention, when they were stricken out, and the general jurisdiction over those as well as other controversies delegated to this court. My conclusion, after an examination of the clause, is, that it is only in controversies between the States that one of their number can be impleaded in this court without its explicit consent ; and that this jurisdiction is special, as to the controversy and the parties, embracing none except those between the States of the Union ; that the court has no original jurisdiction of the United States, and none of a controversy between them and an individual State ; and consequently, that they have no title to appear as a party to the record, nor in any undefined and uncertain relation to it.[1]

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 521).

From this judgement, with its theory of express powers not subject to interpretation, the reader will not be surprised to learn that Mr. Justice Campbell resigned from the Supreme Court when Louisiana, whereof he was a citizen, attempted to secede from the more perfect Union.

20. State of Alabama v. State of Georgia.

(23 Howard, 505) 1859.

A boundary dispute

The case of *Alabama* v. *Georgia* (23 Howard, 505), like so many of its predecessors, was a boundary dispute—also, it may be said in passing, that the overwhelming majority of arbitrations between nations are of the same character. The suit was begun in 1855 by the filing of the bill of Alabama against the very sovereign state of Georgia, which had twice refused to comply with decisions of the Supreme Court against it. The case depends upon the interpretation to be given to a written agreement, in this case the compact of 1802 between the United States and Georgia, and the intent of the parties, as shown by the practice of nations, when a river is made a boundary between them.

about the title to part of a river bed.

The State of Alabama contended in its bill that, by a just and proper construction of the compact and deed of cession from Georgia of the territory from which Alabama was formed, the boundary line began at a point, to quote the language of the report, ' where the 31st degree of north latitude crosses the Chattahoochee river, and on the western bank of said river, on that part or portion of the said bank that reaches to or touches the water at ordinary or common low water, and runs up said river and along the western bank thereof, and on said portion of said bank that touches the water at its ordinary or common height, until said line reaches the point on said river from whence it leaves the same in a straight direction to Nickajack—in other words, that said line, so far as it runs on the bank of the Chattahoochee river, runs upon the western bank at the usual or common low-water mark '.[1]

In 1858 the State of Georgia answered, reserving the advantage to be derived from demurrer or plea to the bill if it should be later minded to do one or the other. It admitted the facts of the case as stated by Alabama as well as the conclusion that the eastern boundary thereof was the western boundary of Georgia ' wherever that might be ', as the two States are contiguous. The dispute was precisely as to the location of this line, and the strip of territory claimed by Alabama was likewise claimed by Georgia, to determine the ownership of which, and therefore the boundary between the States, this suit was brought. Having quoted the report summarizing Alabama's claims, as set forth in its bill, the language of the report is quoted setting forth Georgia's contention in its answer. Thus :

So far as this line runs along the western bank of the Chattahoochee river, Georgia denies that it runs along the usual or common low-water mark, but, on the contrary, she contends that it runs along the western bank at high-water mark, using high-water mark in the sense of the highest line of the river's bed ; or, in other words, the highest line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth.[2]

[1] *State of Alabama* v. *State of Georgia* (23 Howard, 505, 506).
[2] *Ibid.* (23 Howard, 505, 509).

Such was the dispute between Alabama and Georgia, and such was the contention of each. From an international point of view the statement of the case is interesting, and the argument of counsel exceptionally so, for the evidence was all documentary. The arguments, written and oral, are unfortunately not preserved by the reporter in the report of the case, who contents himself with the statement that they ' partook rather of the character of a diplomatic negotiation than a forensic dispute, and the reporter declines to abbreviate them in a law book '.

The opinion, delivered by Mr. Justice Wayne, was the unanimous opinion of his brethren, and is the only opinion in the case. It is brief and to the point, and as to the point he says :

Alabama claims that its boundary commences on the west side of the Chattahoochee river at a point where it enters the State of Florida ; from thence up the river along the low-water mark, on the western side thereof, to the point on Miller's Bend, next above the place where Uchee creek empties into such river ; thence in a straight line to Nickajack, on Tennessee river.[1]

The contention of Georgia, although it has already been quoted, is nevertheless stated in the language of the learned judge, in order that the case as the court conceived it may be clearly and fully presented ; and the issue between the two States drawn from these conflicting claims will likewise be given in the language of the court, to the end that the entire case may be given at the very beginning of the discussion and as the court itself understood it. Thus, as to the contention of Georgia :

Georgia denies that the line intended by the cession of her western territory to the United States runs along the usual low-water mark of the perennial stream of the Chattahoochee river, but that the State of Georgia's boundary line is a line up the river, on and along its western bank, and that the ownership and jurisdiction of Georgia in the soil of the river extends over to the water-line of the fast western bank, which, with the eastern bank of the river, make the bed of the river.[2]

And finally, the issue :

The case turns on the meaning of the word ' bank '.

The difference between the two States must be decided by the construction which this court shall give to the following words of the contract of cession : *West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof.*[3]

In what may be considered as the conclusion of the introductory portion of Mr. Justice Wayne's opinion, he calls attention to and lays stress upon the fact that the agreement of 1802 between the United States and Georgia, which the court was called upon to interpret and to apply, was not merely the location of a line between the United States, on the one hand, and the sovereign State of Georgia, on the other ; but that it was a mutual cession of the territory on either side of the line, determining title and quieting possession, inasmuch as the United States ceded all its right, title, and interest in and to the territory lying east of the line, and Georgia ceded to the United States all its right, title, and interest in and to the west thereof.

On approaching the case the learned Justice made a statement of considerable importance, as it laid down a principle which the Court intended to follow, that the pleadings in the case setting forth the contentions of the parties were in themselves

[1] *State of Alabama* v. *State of Georgia* (23 Howard, 505, 510).
[2] *Ibid.* (23 Howard, 505, 510).
[3] *Ibid.* (23 Howard, 505, 511).

decisive of the case, as no evidence had been introduced; and that the boundary line could be satisfactorily determined and the line run from the pleadings 'notwithstanding their difference as to the locality and direction of it on the Chattahoochee river'.[1] The learned Justice then examines the pleadings, especially the answer of Georgia, which, for present purposes, may be considered as sufficiently summarized in the statement of Georgia's claims, already quoted from the beginning of Mr. Justice Wayne's opinion, that the claim of that State was not limited or restricted to low-water mark on the western bank of the Chattahoochee, but extended to the highest water line of the river upon that bank, which Georgia contended to be the bank of the river, and therefore within its territory and subject to its jurisdiction. So far, however, the case is one of assertion and denial and of restatement and of redenial; and it is one of fact and of conflicting fact. The learned Justice recognized this as clearly as the reader, but he was anxious to separate the undisputed from the disputed facts, and, being thus on a firm ground of fact, to state the law applicable to the dispute and decisive of it. Thus, he says:

Case decided upon the pleadings.

The contract of cession must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and States as to their ownership and jurisdiction on the soil of rivers within their banks and beds. Such authorities are to be found in cases in our own country, and in those of every nation in Europe.[2]

How the contract of cession is to be interpreted.

Now, the importance of this statement, simple as it seems, cannot be overestimated. Although a suit between States, the principle of law applied is that obtaining between private persons *in pari materia*. In the English-speaking world, where remedies are so largely judicial rather than administrative, the principles of law to be applied are to be found in the opinions of the Court rather than in the writings of the learned; inasmuch as in the English-speaking world it is the opinion of the court, not the text-book of the commentator, which carries weight. Again, the learned Justice recognized the distinction between the contentions of States and private parties. Because of this distinction, he refers to the writings of publicists, inasmuch as the law of nations is largely the creation of publicists, who base their views upon the practice of nations, and influence by their statements, if they do not wholly control the future practice of states. Differing from the writings of the learned in matters of private right, they are to be taken as evidence of public right and of what the law of nations really is, as stated by the Supreme Court of the United States in the recent case of the *Paquete Habana* (195 U.S. 677, 700), decided in 1900.

Finally, it is interesting to note that the learned Justice, stating that there are cases in our own country, does not limit himself to those cases, but refers to 'those of every nation in Europe'. For, although international law is recognized by the Constitution of the United States, and proclaimed by judicial decisions to be a part of the law of the land, it nevertheless is a system of law European in its origin and universal in its theory and application. For example, Mr. Justice Wayne quotes Grotius to the effect that a river separating two jurisdictions 'is not to be considered

Grotius and Vattel cited.

[1] *State of Alabama* v. *State of Georgia* (23 Howard, 505, 511).
[2] *Ibid.* (23 Howard, 505, 513).

barely as water, but as water confined in such and such banks, and running in such and such channel. Hence, there is water having a bank and a bed, over which the water flows, called its channel, meaning, by the word channel, the place where the river flows, including the whole breadth of the river '.[1] And Vattel, the second luminary of the law of nations, is quoted to the effect that ' the bed belongs to the owner of the river. It is the running water of a river that makes its bed ; for it is that, and that only, which leaves its indelible mark to be readily traced by the eye ; and wherever that mark is left, there is the river's bed. It may not be there to-day, but it was there yesterday ; and when the occasion comes, it must and will—unobstructed—again fill its own natural bed. Again, he says, the owner of a river is entitled to its whole bed, for the bed is a part of the river '.[2]

Precedents examined.

So much for European publicists ; next, as to the cases. The first is that of *Thomas* v. *Hatch* (3 Sumner, 178), in which Mr. Justice Story, sitting as Circuit Justice, defined ' shores or flats to be the space between the margin of the water at a low stage, and the banks to be what contains it in its greatest flow '. And he invokes the authority of even a greater than Mr. Justice Story, quoting the views of the great Chief Justice himself, who said, in delivering the opinion of the Court in the case of *Handly* v. *Anthony* (5 Wheaton, 374), decided in 1820 :

> The shore of a river borders on the water's edge ; and the rule of law . . . is, that when a great river is a boundary between two nations or States, if the original property is not in either, and there be no convention about it, each holds to the middle of the stream.[3]

Such being the views of the publicists and the decisions of the court in the absence of convention, which can, of course, vary the doctrine of publicists and the holdings of courts, the learned Justice refers to well-known instances in the history of his country, saying that ' Virginia, in her deed of cession to the United States of the territory north-west of the Ohio, fixed the boundary of that State at low-water mark on the north side of the Ohio ; and it remains the limit of that State and Kentucky, as well as of the States adjacent, formed out of that territory . . . by compact with Virginia and Kentucky, the navigation is free. A like compact exists between New York and New Jersey, as to the Hudson river and waters of the bay of New York and adjacent waters '.[4]

Dictionaries cited.

Next comes the turn of the lexicographer, Webster's dictionary, then too recent to be a classic, is cited, and that scholar's definition of a bank is quoted with approval as ' a steep declivity rising from a river or lake, considered so when descending, and called acclivity when ascending '. And a dictionary of that sturdy pioneer and rugged man, Dr. Johnson, whose work has become a classic in ceasing to be an authority, is quoted as defining ' the word bank to be the earth arising on each side of a water '. The learned Justice continues : ' We say properly the shore of the sea and the bank of a river, brook or small water.' And with a feeling for literature, which this opinion evidences, Mr. Justice Wayne continues :

> In the writings of our English classics, the two words are more frequently used in those senses ; for instance, as when boats and vessels are approaching the shore to communicate with those upon the banks.[5]

[1] *State of Alabama* v. *State of Georgia* (23 Howard, 505, 513).
[2] *Ibid.* (23 Howard, 505, 513).
[3] *Ibid.* (23 Howard, 505, 513–14).
[4] *Ibid.* (23 Howard, 505, 514).
[5] *Ibid.* (23 Howard, 505, 514).

And the learned Justice, not content with the writings of publicists, the decisions of courts and the definitions of English dictionaries, broadens the point of view by referring to Bailey as saying in his edition of the Universal Latin Lexicon of Facciolatus and Forcellinus, that the bank of a river is *extremitas terrae quod aqua alluitur et proprie dicitur de flumine; ut litus de mare, nam hoc depressum est declive atque humile, ripa altior fere est praeruptior;* and again, *ripa recte definitur id quod flumen continet, naturalem vigorem cursus sui tenens.*

From these various authorities the learned Justice deduces the following principle:

Notwithstanding that there are differences of expression in the preceding citations, they all concur as to what a river is; what its banks are; that they are distinct from the shore or flat, and as to what constitutes its channel.[1]

And supported by these authorities he thus concludes his opinion, which is also the decree of the court in the controversy between Alabama and Georgia:

Decision of the Court in favour of Georgia.

With these authorities and the pleadings of this suit in view, all of us reject the low-water mark claimed by Alabama as the line that was intended by the contract of cession between the United States and Georgia. And all of us concur in this conclusion, that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee river and along the western bank thereof.

We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil *which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.*

The western line of the cession on the Chattahoochee river must be traced on the water-line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion.

By the contract of cession, the navigation of the river is free to both parties.[2]

21. State of Kentucky v. Dennison, Governor of Ohio.

(24 Howard, 66) 1860.

A suit against the Governor in his official capacity.

The case of *Kentucky* v. *Dennison, Governor of Ohio*, is a suit by the State of Kentucky against the Governor of Ohio in his official capacity, which has always been considered, is now, and is likely to be held in the future, to be a suit against the State whereof he was the chief magistrate. Important in itself, it drew, it is believed, the appropriate conclusion from the case of *Massachusetts* v. *Rhode Island*, that the governor of a state could not be coerced to execute the judgement of the Court against his state, inasmuch as the appearance of that body politic is voluntary, as is its participation in the entire proceeding. If not important enough in itself,

[1] *State of Alabama* v. *State of Georgia* (23 Howard, 505, 514).
[2] *Ibid.* (23 Howard, 505, 514–15).

it was decided on the eve of a great conflict, and if not during war amid the rumours of impending war, when the States of the Union, unmindful of the compact which they had made, reverted to the battlefield instead of the court room to settle the controversy between them ; and the case itself dealt with the cause of the conflict—slavery.

But to the case, which is thus broadly and accurately stated, indeed, one may say, ominously stated, in the opening lines of the report which the official reporter prefixed to the case :

Kentucky seeks a *mandamus* for the surrender of a fugitive from justice.

A motion was made in behalf of the State of Kentucky, by the direction and in the name of the Governor of the State, for a rule on the Governor of Ohio to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to the State of Kentucky, having jurisdiction of the crime with which he is charged . . .[1]

Upon the motion being made, the court ordered notice of it to be served on the Governor and Attorney General of Ohio, to appear on a day mentioned in the notice. The Attorney General of Ohio appeared, but under a protest, made by order of the Governor of Ohio, against the jurisdiction of the court to issue the mandamus moved for.[2]

Because of the objection to the jurisdiction, the reader would be justified in assuming that this phase of the question was argued at great length and debated with great care. The question argued by Counsel was technical and beyond the purpose of this narrative, inasmuch as it dealt with the right of the Court, not to assume jurisdiction and to decide controversies between States of the Union, but with the right of the Court, having jurisdiction of disputes between States, to administer the appropriate remedy in the form of a mandamus. But although the arguments of counsel will not be referred to, the nature and form of the motion and of the remedy will be considered as they are stated by Mr. Chief Justice Taney in delivering the unanimous opinion of the court.

But before yielding to the Chief Justice it is advisable to recount, however briefly, the facts in the case and the provisions of the law upon which the case depends. In 1859 one Willis Lago, a free man of colour, was indicted by the grand jury of Woodford Circuit Court in the State of Kentucky of the crime of assisting a slave, Charlotte by name and the property of C. W. Nuckols, in the attempt to escape from Kentucky across the Ohio River into the free State of Ohio. As Willis Lago was duly indicted for this offence, which was a crime 'against the peace and dignity of the Commonwealth of Kentucky', he was in fact and in law a fugitive from justice, and the State of Kentucky was entitled to receive him from the hands of the chief executive of the State of Ohio, in accordance with the express language of Article IV, Section 2, of the Constitution of the United States :

Text of the Constitution, Art. IV, s. 2.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall, on Demand of the Executive Authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the Crime.

Inasmuch as this provision of the Constitution was not self-executing, and contemplated procedure to make it effective, an act was passed by the Congress in 1793,

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66).
[2] *Ibid.* (24 Howard, 66, 70).

regulating the procedure to be followed in such cases ; and the State of Kentucky, in accordance with the provisions of this act, presented a copy of the indictment, certified and authenticated, to the Governor of Ohio by the authorized agent of the Governor of Kentucky, and demanded the arrest and the delivery of the fugitive from justice, the free man of colour, Willis Lago. Because of the refusal to comply with the duty imposed by the Constitution and regulated by act of Congress, the motion for a mandamus was filed in the Supreme Court to compel the Governor of Ohio to perform the duty imposed by the Constitution and regulated by the act of Congress passed at a time when the framers of that now venerable instrument sat in the Congress and interpreted and applied its provisions.

Decision of the Court.

In beginning his opinion, Mr. Chief Justice Taney stated the gravity of the case, although the question of jurisdiction had been settled, the form, nature, and process to be issued, determined, and upon whom it should be served, and thus could not longer be regarded, he said, 'as open to further dispute'. The gravity, therefore, did not lie in these things. It lay in the fact, of which the Court was sensible, that the power of the Court to enforce its decrees was in question, and that, in all probability, the Governor of Ohio would not obey the mandate of the Court if a writ of mandamus were issued against him, and comply with his constitutional duty in accordance with the act of Congress of 1793. Notwithstanding that the objections taken by the counsel for the State of Ohio had all been made and determined, the Court proceeded to an analysis of them, as it was evidently necessary to restate principles which are controverted, and by restating re-enhance their authority. On the objection that the original jurisdiction conferred by the Constitution could not be exercised without the intervention of the Congress prescribing the method and the procedure, the Court contented itself with citing the early cases as precedents, for they were decided without act of Congress and they made the procedure which the Court then and since then has followed. These cases were : *Georgia* v. *Brailsford* (2 Dallas, 402, 15) ; *Oswald* v. *New York* (2 Dallas, 401, 2, 15) ; *Chisholm* v. *Georgia* (2 Dallas, 419), regarding which Mr. Chief Justice Taney said that the dissenting opinion of Mr. Justice Iredell was not followed and that the views of the majority on questions of procedure were correct ; *New Jersey* v. *New York* (5 Peters, 284), quoting with approval the language of Mr. Chief Justice Marshall holding the cases aleady cited as precedents ; and the case of *Grayson* v. *Virginia* (3 Dallas, 320), which made the rule, since followed in the service of process upon the Governor and the Attorney-General of the State.

As to the contention that mandamus was a very special writ, and that it depended upon the prerogative of the crown and could not be issued in ordinary courts, the Chief Justice contented himself with the statement that 'it is equally well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ', and that 'the power to issue it has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable'.[1]

It is important to be clear on these points, because the Supreme Court, in the exercise of its original jurisdiction, does not administer a justice of its own, a process of a special nature, although its remedy and judgement against a State is indeed

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 97).

a thing without precedent. It has been stated in the introduction to this case that it is to be regarded as a suit against the State of Ohio, and the Court so regarded it, instancing as authority *Madrazo* v. *Governor of Georgia* (1 Peters, 110), decided in 1828, in which the claim was made upon the Governor in his official capacity and the State was held to be a party on the record. Mr. Chief Justice Taney, after calling attention to the fact that the State was a defendant in this case, said that frequently the suit is brought in the name of the Governor; that this was indeed the form originally used, and that it was always regarded as the suit of the State. And he points out that the very first case to be found in our reports of a suit against a State was entitled 'The State of Georgia, by Edward Tellfair, Governor of the said State, complainant, against Samuel Brailsford and others', and that the second case, decided as early as 1793, was likewise entitled 'His Excellency Edward Tellfair, Esquire, Governor and Commander-in-Chief in and over the State of Georgia, in behalf of the said State, complainant, against Samuel Brailsford and others, defendants'.

The Chief Justice thus summarizes what he and his brethren considered necessary in the year 1860 to state concerning jurisdiction, process in general, and in particular, so far as the writ of mandamus was concerned:

The cases referred to leave no question open to controversy, as to the jurisdiction of the Court. They show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this Court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the Court may regulate and mould the process it uses in such manner as in its judgment will best promote the purpose of justice. And that it has also been settled, that where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which every one is entitled, where it is appropriate process for asserting the right he claims.

The Governor represents the State.

We may therefore dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by mandamus is the only mode in which the object can be accomplished.[1]

The jurisdiction affirmed.

This brings the Court face to face with the question whether the right asserted by the plaintiff existed, which is only another way of saying, whether the writ of mandamus could lie in the case. As is natural, he quotes the clause of the Constitution previously quoted, making it the duty of the Governor of the State to surrender the person charged with treason, felony, or other crime, and he brushes aside the argument of counsel for Ohio that 'crime' is used in a very special sense of the rank and dignity of treason, and felony, with which for the moment it is associated. Thus, speaking for his brethren of the Court, he says:

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, 'treason, felony, or other crime', in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of

The word 'crime' covers every offence,

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 98).

the State. The word ' crime ' of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called ' misdemeanors ', as well as treason and felony.[1]

And with this statement the Chief Justice likewise brushed aside the contention of the State of Ohio, and indeed one of the grounds upon which the Governor refused to deliver the fugitive, that because of its place in the context the word ' crime ' must be confined to offences already known to the common law and to the usage of nations ; that the crimes must be generally admitted to be such in every civilized community, and that the offence included within the word ' crime ', used in connexion with treason and felony, cannot be extended to those created by local statute growing out of local circumstances, and assuredly not to the violations of ordinary police regulations.

This was, in the opinion of the Court, a serious contention, not in the sense that it was to be seriously taken ; but, if accepted, it would nullify the clause of the Constitution and run counter to the usage and practice of nations. Therefore, the Chief Justice brought the full force of his experience as a former Attorney-General of the United States and of his learning in matters international against it, saying, not only in his behalf but in behalf of the Court, whose unanimous judgement he was delivering :

not only those which are extraditable between independent nations.

But this inference is founded upon an obvious mistake as to the purposes for which the words ' treason and felony ' were introduced. They were introduced for the purpose of guarding against any restriction of the word ' crime ', and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offences were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offence. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton on the Law of Nations, 171 ; Foelix, 312 ; and Martin, Vergé's edition, 182. And the English Government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the States of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offences against the sovereignty of the State, as well as all other crimes. And as treason was also a ' felony ' (4 Bl. Com. 94) it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it.[2]

It will be observed that, in addition to the reason of the thing, and an interpretation of the terms ' felony ' and ' crime ' which could not be gainsaid, the Chief Justice, with a warmth of language, and suggesting fervour as well as warmth, defined the relations of the States, which were, in his opinion, not inferior body politics sunk to the level of provinces, but separate sovereignties, ' independent of each other ', in so far as their internal government is concerned. And it will be noted that the compact between the States is not to be construed as an ordinary

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 99).
[2] *Ibid.* (24 Howard, 66, 99–100).

treaty for extradition, as in the case of nations altogether independent of each other, for the States making the Union, while independent within the sphere of their rights reserved, are nevertheless not independent of each other, as they created an agent of their own, vesting it with powers expressly or impliedly granted, to be exercised in common, as distinct from the separate interests of the States, which each regulates for itself. These views the Chief Justice restates, albeit in a different form, dwelling upon the purpose of the Union of the States rather than on its form and content :

Mutual support the object of the Union.

For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required ; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government ; and that nothing could be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered.[1]

Mr. Chief Justice Taney re-enforces the need of mutual support ' in bringing offenders to justice, without any exception as to the character and nature of the crime ', by a reference to the Articles of Confederation between the New England colonies, adopted in 1643, in which the colonies of Massachusetts, of New Plymouth, of Connecticut, and of New Haven, bound themselves to deliver up a prisoner who escaped, or any fugitive, for any criminal cause, commanding the magistrate of the colony in which the prisoner or fugitive should be found to issue a warrant for his apprehension and his delivery to the officer entitled to receive him, and that the help needed for the safe returning of such offender was to be granted upon payment of the charges incurred. And this portion of the Articles bears out the comment of the Chief Justice that no discretion was allowed the magistrate of the colony within whose jurisdiction the offender was found, inasmuch as he was bound to arrest and deliver the prisoner or the fugitive ' upon the production of the certificate under which he was demanded '.[2]

The Chief Justice next takes up the question, upon whom the demand is to be made, admitting that the demand extends to any and all offences made such by local law. On this point the Constitution is silent, contenting itself with the statement that the Governor of the State shall make the demand. And yet it was clear that, as the Governor represents the State in one case, he would naturally represent it in the other, and under the Confederation it must necessarily have been so. Thus, as the Chief Justice says :

But, under the Confederation, it is plain that the demand was to be made on the Governor or Executive authority of the State, and could be made on no other department or officer ; for the Confederation was only a league of separate sovereignties, in which each State, within its own limits, held and exercised all the powers of sovereignty ; and the Confederation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a State. In the present Constitution, however, these powers, to a limited extent, have been conferred on the General Government within the territories of the several States.

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 100).
[2] *Ibid.* (24 Howard, 66, 101).

But the part of the clause in relation to the mode of demanding and surrendering the fugitive is, (with the exception of an unimportant word or two,) a literal copy of the article of the Confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the Confederation, must have been in the minds of the members of the Convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the Confederation—that is, of demanding the fugitive from the Executive authority, and making it his duty to cause him to be delivered up.[1]

Speaking for the Court, the Chief Justice paused, as in a previous part of the opinion, to summarize the views which he had expressed, as they are a foundation upon which he builds, or a link in the chain of his argument :

There is an absolute obligation to deliver up all fugitives.

Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders, and to its early adoption by the colonies, and then by the Confederated States, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offence made punishable by the law of the State in which it was committed, and that it gives the right to the Executive authority of the State to demand the fugitive from the Executive authority of the State in which he is found; that the right given to ' demand ' implies that it is an absolute right ; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled.[2]

And, not wishing to rest upon the reason of the thing, the Chief Justice invokes authority, saying :

This is evidently the construction put upon this article in the act of Congress of 1793, under which the proceedings now before us are instituted. It is therefore the construction put upon it almost contemporaneously with the commencement of the Government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the Congress which enacted the law.[3]

The exercise of such a right, involving as it did the safety of the State whence the fugitive had fled, and the susceptibility of the State in which he happened to be found, required a method harmonizing right on the one hand with propriety on the other, and this method they stated in terms of law ; for, as Chief Justice Marshall impressively said, the fathers of the Republic created a government of laws, not of men. The nature of the Union also required it, which Chief Justice Taney thus pointed out :

The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The Governor of the State could not, upon a charge made before him, demand the fugitive ; for, according to the principles upon which all of our institutions are founded, the Executive Department can act only in subordination to the Judicial Department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the Judicial Department. The Executive authority of the State, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 102–3).
[2] *Ibid.* (24 Howard, 66, 103).
[3] *Ibid.* (24 Howard, 66, 103–4).

Executive authority of the State upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.[1]

The law of Congress of 1793 was not, however, an academic exercise. It was passed because the question arose in concrete and embarrassing form between the State of Pennsylvania and the State of Virginia, of which Washington, President of the Constitutional Convention, was a citizen, of which Madison, the father of the Constitution, was likewise a citizen, and which he then at that moment represented in Congress. The circumstances leading to this act are thus stated by the Chief Justice as an introduction to the text of the act, which he later quotes :

These difficulties presented themselves as early as 1791, in a demand made by the Governor of Pennsylvania upon the Governor of Virginia, and both of them admitted the propriety of bringing the subject before the President, who immediately submitted the matter to the consideration of Congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the Constitution, which declares, ' that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, of every other State ; and the Congress may by general laws prescribe the manner in which acts, records, and proceedings, shall be proved, and the effect thereof.' And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between States, and the authentication of official documents—was in the minds of the framers of the Constitution, and had its influence in inducing them to give this power to Congress. And acting upon this authority, and the clause of the Constitution which is the subject of the present controversy, Congress passed the act of 1793, February 12th, which, as far as relates to this subject, is in the following words :

Act of Congress of 1793.

' Section 1. That whenever the Executive authority of any State in the Union, or of either of the Territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the Executive authority of any such State or Territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief Magistrate of the State or Territory from whence the person so charged fled, it shall be the duty of the Executive authority of the State or Territory to which such person shall have fled to cause him or her to be arrested and secured, and notice of the arrest to be given to the Executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear ; but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged.[2]

In a previous passage of his opinion, the Chief Justice had declared the duty of the Governor of the State in which the fugitive was found to be 'merely ministerial, without the right to exercise either executive or judicial discretion'. And, following upon the heels of the statute just quoted, he states the sense in which he and his learned brethren understood it, saying :

It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress ; and the certificate of the Executive authority is made conclusive as to their verity when presented to the Executive of the State where the fugitive is found. He has no right to look behind them, or to

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 104).
[2] *Ibid.* (24 Howard, 66, 104–5).

question them or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed. It is said in the argument, that the Executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every marshal and sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer ; and such is the position and character of the Executive of the State under this law, when the demand is made upon him and the requisite evidence produced. The Governor has only to issue his warrant to an agent or officer to arrest the party named in the demand.[1]

The Governor's duty is purely ministerial.

The Court, speaking through its Chief Justice, brushed aside all of what may be called the preliminary questions, that of jurisdiction, that of process, that of law, creating an obligation and a duty, and approached the great question involved in this case, whether and how this solemn provision of the compact between the States and of the statute of Congress is to be applied and executed. Many distinguished jurists, at home and abroad, hold it to be essential to the very conception of law that it be enforced by physical means, and that if it is not enforced, much more, if it cannot be enforced by physical means, the statute, however well meant, is a mere nullity, a scrap of paper, or, as the poet of our English-speaking people, rather than the statesman of a great and powerful empire, has put it, 'a spring to catch woodcocks,' not men. But the court room has a claim to respect, assuredly not less if not greater than the class-room of the professor or the study or cloister of the scholar and the recluse. The Chief Justice and his brethren were not to be deterred by the practical difficulties of theoretical men, knowing as they did, and as men of the world must know, that public opinion decides whether the sword be drawn, or, if drawn, whether it be sheathed, and that 'a decent respect to the opinions of mankind' often persuades where force fails to compel. This phase of the problem should be and is therefore stated in the language of the Chief Justice, who says :

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated ; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those in any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the Executive authority of the State of Ohio.[2]

The sufficiency of the charge is a question solely for Kentucky.

After having brushed aside as a cobweb the claim of the State in which the fugitive is found to pass upon the sufficiency of the charge against him, the Chief Justice, in measured language, took up and considered the obligation created by the Constitution and the statute and the duty incumbent upon the parties to this controversy.

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 106–7).
[2] *Ibid.* (24 Howard, 66, 107).

'Duty' in the Act means moral duty,

The demand being thus made, the act of Congress declares, that 'it shall be the duty of the Executive authority of the State' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

and no means of enforcing it are provided.

It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word 'duty', the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word 'duty' in the law points to the obligation on the State to carry it into execution.[1]

It is dangerous to comment upon the meaning of the Supreme Court when the Supreme Court has used words and stated the sense in which it understands them. It is, however, permissible, in this connexion, to call the reader's attention to the statement of the Court, with the reminder that it was the unanimous opinion of that august body, that there was no provision of the Constitution by virtue of which a State could be coerced to perform this particular duty—which, as will be presently observed, was a compliance by the State with a judgement of the Supreme Court against that State. The Court, however, had no doubt that the judgement should be obeyed, but it evidently looked to an obedience produced by other means than those of force. Thus the Chief Justice said, speaking for a unanimous Court:

It is true that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the State courts the same authority with the District Court of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 107–8).

were for some years exercised by State tribunals, readily, and without objection, until in some of the States it was declined because it interfered with and retarded the performance of duties which properly belonged to them, as State courts; and in other States, doubts appear to have arisen as to the power of the courts, acting under the authority of the State, to inflict these penalties and forfeitures for offences against the General Government, unless especially authorized to do so by the State.

And in these cases the co-operation of the States was a matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution. And the acts of Congress conferring the jurisdiction merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience.[1]

The provision of the Constitution and the language of the statute were not couched in terms of comity, a fact which the Chief Justice brought into bold relief, because if it were a matter of comity, an obligation was not created. Therefore, to remove the misconception, the Chief Justice proceeded:

But the language of the act of 1793 is very different. It does not purport to give authority to the State executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering.[2]

Performance of the duty depends upon fidelity to the Constitution,

Therefore, the Court was dealing with law mandatory in character and perfect in all its elements, and the duty was a duty springing and flowing from this law, not from a sense of comity. 'The performance of this duty, however,' to quote the exact language of the Court, 'is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty'.[3]

Should this confidence be misplaced, should the duty not be performed, what then? Mr. Chief Justice Taney, face to face with this question, involving not merely the sanction supposed to be essential to law, the prestige and dignity of the Court over which he presided, but the powers of the agent of the States in execution of a judgement against one of them, quietly, impressively, and modestly ended the opinion and announced the judgement of the Court in the following simple and all-important sentence:

and there is no power to compel performance.

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.[4]

Mandamus refused.

[1] *State of Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 108–9).
[2] *Ibid.* (24 Howard, 66, 109).
[3] *Ibid.* (24 Howard 66, 109).
[4] *Ibid.* (24 Howard, 66, 109–10).

Summary of the preceding cases.

The group of cases beginning with *Missouri* v. *Iowa* (7 Howard, 660), decided in 1849, and ending with *Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66), decided in 1860, makes a distinct advance in the judicial settlement of disputes between the States of the American Union. There had been theretofore but one final decision, and the remedy was negative in the sense that Rhode Island's claim against Massachusetts was dismissed and the two States were left as they were before the beginning of the suit in possession of the territories whereof they were then possessed, and which they had occupied for the period of wellnigh two centuries. But if the Supreme Court was to perform its great mission it should render affirmative relief, that is to say, it should not content itself with dismissing the bills which were brought, but it should grant relief in appropriate cases whenever the case of the plaintiff required it, and on a cross bill whenever the defendant state showed itself to be entitled to relief.

The first case falls within this second group, in which the Supreme Court entered a decree according to the prayer of the complainant State ; and without going into details, which have been stated at considerable length, it is sufficient for present purposes to recall that, in the first case of *Missouri* v. *Iowa* (7 Howard, 660), the Court determined the part of the boundary in controversy between the two states, decreed that the line thus ascertained should be drawn by commissioners, and that the State of Missouri should be quieted in the possession of the territory to the south of that line. The jurisdiction of the Court was so well recognized by this time that the question was not raised. The States complied with the judgement and the line was actually drawn and marked. It is to be observed that, although the suit was treated in that broad and equitable spirit becoming the controversies of States, the decree is in the form of a direction, as in the case of individuals, and that it is framed upon the model of a decree of this nature.

In like manner the case of *Florida* v. *Georgia* (17 Howard, 478), marked a very great advance over any case previously submitted to and considered by the Court, because the United States, as distinct from one of the States, appeared before the Supreme Court in behalf of its own interests—which is only another way of saying, as a trustee of the interests of the States not in controversy, because the States form the United States, and what we are pleased to call and very properly do call the United States is the agent for these States in the maintenance of those rights and in the performance of those duties which they have in common. Within the limits of the grant, the United States exercises sovereign powers, just as each State of the Union, within the sphere of the reserved rights, likewise exercises sovereign powers.

The United States, however, did not in these instances appear as a plaintiff, for in so doing it would have exposed itself to a judgement against it, as a sovereign state, if it appear as a plaintiff, renounces its immunity from suit, and cannot well ask on the one hand what it denies on the other. The United States contented itself with a statement that it was interested in the controversy ; that the decision of the Court in the case as presented might affect the rights of the United States ; and that, therefore, it claimed the right to intervene and to take part in the conduct of the suit if necessary, in order to call its rights to the attention of the Court, lest they might be prejudiced by unskilful trial of the case or by agreement of the parties to the record contrary to the interests of the United States, acting not merely in its own behalf but in behalf of all the states of the Union.

Here again the Court was guided by the procedure in suits between individuals, moulding it, however, in the interest of the contending sovereignties ; for although it was familiar practice to allow counsel to be heard for an individual without making that individual a party to the suit, it was not necessary to do so when new evidence was to be introduced by counsel on behalf of his client. The Attorney-General, appearing on behalf of the United States, asserted the right to introduce evidence, thus claiming to frame the issue, to control the proceedings, and to affect the judgement. The Court allowed the United States to intervene under these circumstances, and in so doing a long step was taken toward the appearance of the United States as a plaintiff State in the Supreme Court against a State of the American Union. In allowing the United States to intervene in the controversy between Florida and Georgia, the Court was very careful to point out that the United States was not a party to the record, that it was not a party litigant, and that it was not to be regarded as a suit on the part of the United States against a State or a holding of the Court in favour of the right of the United States so to appear. It was, however, but a step from the position of intervenor to that of plaintiff, a step taken without argument in the case of *United States* v. *North Carolina* (136 U.S. 211), decided in 1890, and upon very great argument on a matter of jurisdiction, in the case of the *United States* v. *Texas* (143 U.S. 621), decided two years later, in which the right of the United States to appear as a plaintiff was established. Finally, the case of *Kentucky* v. *Dennison* (24 Howard, 66), decided in 1860, interesting and important in itself, carried the decision of the Court in the case of *Massachusetts* v. *Rhode Island* to its logical conclusion, holding that, inasmuch as the appearance of a State is voluntary and is not to be coerced, compliance with the judgement is likewise voluntary, in the sense that the State is not to be coerced by physical force to perform the judgement.

Value of the precedent for international disputes.

Many important controversies of a justiciable nature between State and State have been tried since these twenty cases (for, taken together, they amount to that imposing figure if *Cherokee Nation* v. *Georgia* is excluded) ; but, with the exception of the decision of the Supreme Court permitting the United States to appear before it and to litigate its controversy against a state of the Union, foreshadowed in the case of *Florida* v. *Georgia*, it may be said that the right of the States to appear, the process to secure appearance, and the procedure to be followed, were determined, and that the subsequent cases, however interesting in themselves, and however valuable the decisions may be from the standpoint of law invoked and applied, are chiefly important as additional examples of judicial settlement of justiciable disputes between sovereign States. The experiment of the statesmen of the New World was justified by its fruits. The way had been blazed, the method devised, the precedent created for a Society of Nations to settle its disputes of a justiciable nature by the resort to a court of justice, created by its members, to which appearance shall be voluntary and the judgement not executed by force of arms ; and the way pointed out and illustrated in practice by which political controversies of the nations become justiciable by the submission to a Court to be decided by the principles and due process of law obtaining between man and man in any and every civilized state and nation.

VI.

JURISDICTION LIMITED TO CONTROVERSIES IN WHICH STATES ARE REAL PARTIES IN INTEREST; UNITED STATES ITSELF PLAINTIFF AND DEFENDANT.

22. State of Virginia v. State of West Virginia.

(11 Wallace, 39) 1870.

A boundary dispute arising out of the Civil War.

Secession of Virginia from the Union, 1861.

The controversy between Virginia and West Virginia was a boundary dispute of a very peculiar nature, inasmuch as the State of West Virginia came into being because of the war between the States. In February 1861 delegates met in Richmond, the capital of the State, and passed an ordinance of secession, withdrawing the act of accession to the Union of the States passed by a convention of the State, likewise held in Richmond in 1788. But Virginia, like the other States passing ordinances of secession, was not living under the Articles of Confederation but under that more perfect Union drafted by delegates of the States in conference in the summer of 1787 in the city of Philadelphia, and ratified by each of the original thirteen states during the ensuing four years. The association had produced a Union too strong to be broken except by physical force, even as blocks of ice piled together congeal and can only be torn apart by force. The States desiring to maintain the Union and to retain in it every State, proved in the four years' contest, from 1861 to 1865, to be physically stronger than the States which wished to withdraw from the Union, and to form a still more perfect one of their own under the style of the Confederate States of America.

Organization of West Virginia, 1861.

But to return to Virginia. It appeared that approximately one-third of its people in approximately one-third of its territory in the north-western part of the State were opposed to the ordinance of secession. The residents of this region held an assembly of their own in June 1861, claiming to represent the State of Virginia, misrepresented, in their opinion, by the balance of the Commonwealth. They organized themselves as the Government of Virginia, and this new organization was acknowledged by the President and Congress of the United States as the true government of Virginia. The members of this organization were not blind to the fact that they represented but a fraction of the State, albeit in their opinion a very important one, and, desiring to save this portion of the State at least to the Union, the convention ordained, on August 20, 1861, that a new State should be formed and erected out of the territory included within boundaries which they specified and composed of counties which they named. It was felt, however, that the boundaries thus specified were provisional, that the lines might be changed, and that counties other than those named could ally themselves with the new State, should they decide to do so, and send delegates to a subsequent convention which was to meet in Wheeling, November 26, 1861.

The delegates met as contemplated by the ordinance on November 26, 1861, made a constitution of West Virginia, and provided that certain enumerated counties, 44 in number, 'formerly a part of the State of Virginia,' should be 'included in and form a part of the state of West Virginia'.[1] There were certain counties in which the sentiment of the inhabitants appeared to be doubtful, and

Doubtful position of two counties.

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 41).

for present purposes it may be said that these counties were apparently or primarily Berkeley and Jefferson. The controversy between the old and the new State turns upon the right to the possession of those counties, West Virginia claiming them for reasons presently to be stated, and Virginia likewise claiming them because, in the opinion of the mother country, they had not in law ceased to be a part of the Old Dominion.

As regards these counties, the second article of the constitution of West Virginia provided that the counties of Pendleton, Hardy, Hampshire, and Morgan should be included if their inhabitants voted in favour of the adoption of the proposed constitution of West Virginia ; 'and if the same shall be so included, and a majority of the votes cast at the said election or elections, in the district composed of *Berkeley*, *Jefferson*, and Frederick, shall be in favor of the adoption of this constitution, then the three last-named counties shall also be included in and form part of the State of West Virginia '.[1] In this connexion it is material to note that the proposed constitution of the State contained in a different section the provision that ' additional territory may be admitted into, and become part of this State, with the consent of the legislature '.[2] The constitution was put to vote the first Thursday of April 1862 and was ratified by the inhabitants of the 44 counties specifically named in the constitution, and by those of Pendleton, Hardy, Hampshire, and Morgan.[3] The condition, therefore, upon which the counties of Berkeley, Jefferson, or Frederick might be included was fulfilled. But it appeared that no vote was had in these three counties, due, as was stated, to the fact that they were then in the possession and control of the armed forces of the Confederate States, of which Virginia was one, and its capital the capital of the Confederacy.

Provision for a vote of the doubtful counties.

The constitution ratified, 1862.

The constitution having thus been adopted by the north-western portion of Virginia, henceforth to be known as West Virginia, the legislature of Virginia, meaning thereby the legislature of the portion of the State which was opposed to secession, and which claimed to represent the State of Virginia, passed an act on May 13, 1862, in the name and in behalf of the State of Virginia, consenting to the formation of the State of West Virginia, composed of 48 counties, including therein Pendleton, Hardy, Hampshire, and Morgan, but not the counties of Berkeley, Jefferson, or Frederick. The members of the legislature intended that these counties should form an integral part of the new State, if they should desire to do so, and therefore, in the second section of the act, consent was given ' that the counties of *Berkeley*, *Jefferson*, and *Frederick* shall be included in and form part of the State of West Virginia WHENEVER the voters of said counties shall ratify the state constitution, at an election held for the purpose . . .' The legislature likewise directed that the act should be transmitted by the Executive of the State to the Senators and Representatives of Virginia in the Congress of the United States, and that they should endeavour to obtain the assent of Congress to the admission of the State of West Virginia into the more perfect union of the States. On December 31, 1862, the Congress passed the following act :

State of West Virginia sanctioned by Congress Dec. 31, 1862.

Whereas, The people inhabiting that portion of Virginia, known as West Virginia, did by a convention assembled in the city of Wheeling, on the 26th November, 1861, frame for themselves a constitution with a view of becoming a separate and independent State ; *and whereas*, at a general election held in the counties composing

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 41).
[2] *Ibid.* (11 Wallace, 39, 42).
[3] *Ibid.* (11 Wallace, 39, 42).

the territory aforesaid, on the 3d of May last, the said constitution was approved and adopted by the qualified voters of the proposed State ; *and whereas*, the legislature of Virginia, by an act passed on the 13th day of May, 1862, did give its consent to the formation of a new State within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia, and to embrace the following named counties, to wit [the forty-eight counties mentioned in the . . . Virginia act of May 13, 1862, were here set forth by name, and not including Berkeley or Jefferson] ; *and whereas*, both the convention and legislature aforesaid have requested that the new State should be admitted into the Union, and the constitution aforesaid being republican in form, Congress doth hereby consent that the *said forty-eight counties* may be formed into a separate and independent State ; therefore,

Be it enacted, &c., That the State of West Virginia be, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatsoever, &c.[1]

The act of Congress, however, contained a proviso that a certain clause of the proposed constitution of the State be stricken, and that in lieu thereof another clause, on the question of slavery, be inserted. The substitute was to be approved by the convention, by a vote of the inhabitants of the new State, and its adoption certified to the President, who was empowered to issue his proclamation stating the fact. Sixty days after such proclamation the act of Congress admitting the State of West Virginia into the Union area was to come into effect. The clause in question was adopted by the convention, ratified by the voters of the State, and the President's proclamation issued on April 20, 1863.[2]

Proclamation of the State of West Virginia, April 20, 1863.

It will be noted that Berkeley and Jefferson, the two counties in question, and concerning whose possession the controversy between the old and the new State arose, were not included in the constitution of West Virginia nor in the enumeration of the counties contained in the act of Congress. They were not, therefore, within the territorial jurisdiction of West Virginia when it was admitted as a State. But it is also to be borne in mind that the clause of the constitution of the State, drafted by the convention, submitted to and ratified by the voters of the State, and approved by the Congress, contained the clause, already quoted, ' that additional territory may be admitted into, and become part of this State with the consent of the legislature.'

The two counties not within the new State.

The State of West Virginia, however, and the legislature claiming to represent the State of Virginia were intent upon the admission of Berkeley and Jefferson counties to the new State, if the inhabitants of the counties in an election should approve the constitution and request admission to the State ; and apparently no obstacles were to be placed in their way by the authorities in the expression of their approval of the constitution and their desire to separate themselves from the old State and to become an integral part of the new. Therefore, on January 31, 1863, the General Assembly of the ' reorganized ' State of Virginia, relying upon the clause of the constitution of West Virginia permitting additional territory to be admitted with the consent of the legislature thereof, enacted that a vote be taken in the county of Berkeley on the fourth Thursday of May, 1863, in order that the people thereof should determine whether that county should become a part of the State of West Virginia. The Governor of Virginia was directed to certify the result of the election, if in his opinion one had been held according to law, under the seal of Virginia to the Governor of the State of West Virginia. The Governor of Virginia was likewise

Action of the minority legislature of Virginia.

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 43–4).
[2] *Ibid.* (11 Wallace, 39, 44).

empowered to postpone the election if, in his opinion, the polls could not safely and properly be opened and the election held in the county on the date specified.[1]

So much for Berkeley. On February 4, 1863, an act was passed by the same General Assembly of Virginia to allow an election in other counties, among them Frederick and Jefferson, 'or either of them', in order that the people thereof should vote 'for annexation or against annexation'. The consent of the Assembly was given to the annexation in the event that a majority of the inhabitants should declare in favour thereof, and it was further provided, that the legislature of the State of West Virginia should likewise consent. The election was to take place, as under the previous act, on the fourth Thursday of May, 1863.[2]

The counties vote for West Virginia.

The result of the plebiscitum was never in doubt, and the Governor of the State of Virginia duly certified, under the seal of the State, that an election had been held in the two counties and that a majority of the inhabitants thereof had voted for incorporation into the State of West Virginia. And the latter State, in accordance with the clause of the constitution permitting it to increase its territory, extended its jurisdiction over the counties of Berkeley and of Jefferson.[3]

The consent given by Virginia to all of these transactions was the consent of the legislature and of the government sitting in West Virginia and claiming to represent the State. It was not the consent of the legislature and of the government sitting in Richmond, and likewise claiming to represent the State. Each of these bodies spoke, as it will be observed, a different language. On the collapse of the Confederacy, upon Lee's surrender at Appomatox on April 9, 1865, the State of Virginia found itself deprived of a large and valuable portion of what it had always considered as its legitimate domain. Within the course of the same year—to be specific, on December 5, 1865—it repealed each of the acts which the State was reputed to have passed concerning the vote to be taken in Berkeley and Jefferson counties and their admission to the State of West Virginia.[4] On the 10th of March, 1866, the Congress of the United States passed a joint resolution recognizing the transfer of the counties of Berkeley and Jefferson and consenting to such transfer.[5]

Virginia repeals the transfer, 1865.

Congress recognizes the transfer of the counties, 1866.

We have, thus, the following situation: the State of Virginia passed an ordinance of secession; that a portion of the State now forming West Virginia refused to secede, and organized a government which claimed to be the government of the State. A convention of the people within West Virginia was called, a constitution for the new State drafted, and, in accordance with its provisions, submitted to the people for ratification. It was ratified; the consent of the legislature claiming to represent Virginia was given to these transactions; the Congress of the United States approved the constitution, admitted the State to the Union, and the President of the United States issued his proclamation admitting the State. The legislature claiming to represent the State of Virginia consented to the annexation of Berkeley and Jefferson counties to West Virginia should the majority of their inhabitants vote in favour of it and if the legislature of West Virginia should assent. An election was held, resulting in favour of annexation; the legislature of the State of Virginia gave its assent. Two years after these transactions the old and real State of Virginia repealed the acts imputed to it by virtue whereof Berkeley and Jefferson counties were trans-

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 45). [2] *Ibid.* (11 Wallace, 39, 46–7).
[3] *Ibid.* (11 Wallace, 39, 48). [4] *Ibid.* (11 Wallace, 39, 48–9). [5] *Ibid.* (11 Wallace, 39, 49).

ferred to West Virginia, and the Congress of the United States, after the repeal thereof by the State of Virginia, approved the transfer. "'In this state of things,' to quote the language of the official report :

Bill filed by Virginia.

the Commonwealth of Virginia brought her bill in equity against the State of West Virginia in this court on the ground of its original jurisdiction of controversies between States under the Constitution, in which it was alleged that such a controversy had arisen between those States in regard to their boundary, and especially as to the question whether the counties of Berkeley and Jefferson had become part of the State of West Virginia or were part of and within the jurisdiction of the Commonwealth of Virginia ; and the prayer of the bill was that it might be established by the decree of this court that those counties were part of the Commonwealth of Virginia, and that the boundary line between the two States should be ascertained, established, and made certain, so as to include the counties mentioned as part of the territory and within the jurisdiction of the State of Virginia. . . .

To the bill thus filed the State of West Virginia appeared and put in a general demurrer. It was not denied that West Virginia had from the beginning continued her assent to receive these two counties.[1]

The facts of this case have been given at some length, because the separation of West Virginia from the honoured Commonwealth bearing that name has resulted in repeated litigation between the States, due to the assumption by West Virginia of an equitable portion of the debt of the parent state before the separation, or, to be more accurate, before the first day of January, 1861, and the failure of West Virginia to take any steps to ascertain the amount of this indebtedness or to take measures to meet it after the amount had been determined by a solemn judgement of the Supreme Court of the United States. The entire course of the litigation, including the present case, shows West Virginia as determined to hold to its territory as it is unwilling to part with its money.

Decision of the Court.

In delivering the opinion of the majority of the Court in the first phase of this series of cases, Mr. Justice Miller found it necessary to pass upon and to reaffirm the jurisdiction of the Court, inasmuch as it was questioned by counsel for West Virginia ; as Mr. Justice Miller's statement is in itself a summary, calling attention to the very important fact that Mr. Chief Justice Taney, who had consistently opposed the assumption of jurisdiction in all phases of the Rhode Island cases, later withdrew his opposition, so that the Court was henceforth of one mind on the question of jurisdiction, this portion of the learned Justice's opinion is given in its entirety :

Jurisdiction affirmed.

The first proposition on which counsel insist, in support of the demurrer is, that this court has no jurisdiction of the case, because it involves the consideration of questions purely political ; that is to say, that the main question to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute.

This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well-considered cases have been decided. Without entering into the argument by which those decisions are supported, we shall content ourselves with showing what is the established doctrine of the court.

In the case of *Rhode Island* v. *Massachusetts* (12 Peters, 724), this question was raised, and Chief Justice Taney dissented from the judgment of the court by which the jurisdiction was affirmed, on the precise ground taken here. The subject is elaborately discussed in the opinion of the court, delivered by Mr. Justice Baldwin,

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 49–50).

and the jurisdiction, we think, satisfactorily sustained. That case, in all important features, was like this. It involved a question of boundary and of the jurisdiction of the States over the territory and people of the disputed region. The bill of Rhode Island denied that she had ever consented to a line run by certain commissioners. The plea of Massachusetts averred that she had consented. A question of fraudulent representation in obtaining certain action of the State of Rhode Island was also made in the pleadings.

It is said in that opinion that, 'title, jurisdiction, sovereignty, are (therefore) dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it, so that great as questions of jurisdiction and sovereignty may be, they depend on facts.' And it is held that as the court has jurisdiction of the question of boundary, the fact that its decision on that subject settles the territorial limits of the jurisdiction of the States, does not defeat the jurisdiction of the court.

The next reported case, is that of *Missouri* v. *Iowa* (17 Howard, 660), in which the complaint is, that the State of Missouri is unjustly ousted of her jurisdiction, and obstructed from governing a part of her territory on her northern boundary, about ten miles wide, by the State of Iowa, which exercises such jurisdiction, contrary to the rights of the State of Missouri, and in definace of her authority. Although the jurisdictional question is thus broadly stated, no objection on this point was raised, and the opinion which settled the line in dispute, delivered by Judge Catron, declares that it was the unanimous opinion of all the judges of the court. The Chief Justice must, therefore, have abandoned his dissenting doctrine in the previous case.

That this is so is made still more clear by the opinion of the court delivered by himself in the case of *Florida* v. *Georgia* (17 Howard, 478), in which he says that 'it is settled by repeated decisions, that a question of boundary between States, is within the jurisdiction conferred by the Constitution on this court'. A subsequent expression in that opinion shows that he understood this as including the political question, for he says 'that a question of boundary between States is necessarily a political question to be settled by compact made by the political departments of the government. . . . But under our form of government a boundary between two States may become a judicial question to be decided by this court'.

In the subsequent case of *Alabama* v. *Georgia* (23 Howard, 505), all the judges concurred, and no question of the jurisdiction was raised.

We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding.[1]

After having thus cleared the deck for action in a truly militant if not in a military way, the learned Justice, intent on the business before him, lays down an assumption, states a fact, and reduces the questions before the court for consideration to three and defines them in the following words, which the majority of the court considered to be of fundamental importance :

In the further consideration of the question raised by the demurrer we shall proceed upon the ground, which we shall not stop to defend, that the right of West Virginia to jurisdiction over the counties in question, can only be maintained by a valid agreement between the two States on that subject, and that to the validity of such an agreement, the consent of Congress is essential. And we do not deem it necessary in this discussion to inquire whether such an agreement may possess a

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 53–5).

certain binding force between the States that are parties to it, for any purpose, before such consent is obtained.

Three questions for decision.

As there seems to be no question, then, that the State of West Virginia, from the time she first proposed, in the constitution under which she became a State, to receive these counties, has ever since adhered to, and continued her assent to that proposition, three questions remain to be considered.

1. Did the State of Virginia ever give a consent to this proposition which became obligatory on her ?

2. Did the Congress give such consent as rendered the agreement valid ?

3. If both these are answered affirmatively, it may be necessary to inquire whether the circumstances alleged in this bill, authorized Virginia to withdraw her consent, and justify us in setting aside the contract, and restoring the two counties to that State.[1]

To reach conclusions on the first two of these questions raised by the Court, and justified by the facts of the case, it was necessary to examine the course of action on each of these matters taken by the organization claiming to represent the State of Virginia, by the organization claiming to represent the State of West Virginia, and by the Congress, exercising its right under the Constitution to admit, in accordance with the terms thereof, new States to the rights, the duties, and the benefits of the Union. Inasmuch, however, as each of these courses of action has been, for present purposes, sufficiently stated in the introduction, they need not be referred to again ; nor is it necessary to follow the court in this portion of the case, although the conclusion which Mr. Justice Miller reached on behalf of his brethren should be, and therefore is, quoted without comment :

Let us pause a moment and consider what is the fair and reasonable inference to be drawn from the actions of the State of Virginia, the Convention of West Virginia, and the Congress of the United States in regard to these counties.

The State of Virginia, in the ordinance which originated the formation of the new State, recognized something peculiar in the condition of these two counties, and some others. It gave them the option of sending delegates to the constitutional convention, and gave that convention the option to receive them. For some reason not developed in the legislative history of the matter these counties took no action on the subject. The convention, willing to accept them, and hoping they might still express their wish to come in, made provision in the new constitution that they might do so, and for their place in the legislative bodies, and in the judicial system, and inserted a general proposition for accession of territory to the new State. The State of Virginia, in expressing her satisfaction with the new State and its constitution, and her consent to its formation, by a special section, refers again to the counties of Berkeley, Jefferson, and Frederick, and enacts that whenever they shall, by a majority vote, assent to the constitution of the new State, they may become part thereof ; and the legislature sends this statute to Congress with a request that it will admit the new State into the Union. Now, we have here, on two different occasions, the emphatic legislative proposition of Virginia that these counties might become part of West Virginia ; and we have the constitution of West Virginia agreeing to accept them and providing for their place in the new-born State. There was one condition, however, imposed by Virginia to her parting with them, and one condition made by West Virginia to her receiving them, and that was the same, namely, the assent of the majority of the votes of the counties to the transfer.

The two States agreed to the transfer.

It seems to us that here was an agreement between the old State and the new that these counties should become part of the latter, subject to that condition alone. Up to this time no vote had been taken in these counties ; probably none

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 55–6).

could be taken under any but a hostile government. At all events, the bill alleges that none was taken on the proposition of May, 1862, of the Virginia legislature. If an agreement means the mutual consent of the parties to a given proposition, this was an agreement between these States for the transfer of these counties on the condition named. The condition was one which could be ascertained or carried out at any time ; and this was clearly the idea of Virginia when she declared that *whenever* the voters of said counties should ratify and consent to the constitution they should become part of the State ; and her subsequent legislation making special provision for taking the vote on this subject, as shown by the acts of January 31st and February 4th, 1863, is in perfect accord with this idea, and shows her good faith in carrying into effect the agreement.[1]

Congress consented.

The learned Justice, on behalf of the majority of the Court, asks and answers if Congress consented to this agreement ? Congress passed a resolution on March 10, 1866, in which it is specifically stated, ' That Congress hereby recognizes the transfer of the counties of Berkeley and Jefferson from the State of Virginia to West Virginia and consents thereto.' [2] There was no difficulty on this heading, provided that the act of the State of Virginia of December 5, 1865, repealing the various acts consenting to the transfer should be eliminated from consideration, either because the State of Virginia had acted upon the consent so that it was a completed transaction, or because the attempted withdrawal of consent could not affect West Virginia unless it concurred in the withdrawal. This phase of the question was recognized as of importance by the learned Justice, and the majority for which he spoke ; but having decided that Congress consented to the agreements, which the majority found to exist, the question was not so fundamental as it was to the three dissenting justices, Messrs. Davis, Clifford, and Field, who held that that consent had been withdrawn by Virginia before Congress acted upon the transfer, and that therefore at that time there was no agreement regarding the transfer which the Congress could act upon.

Admitting the consent given by the acts of its legislature before the repeal thereof by the statute of December 5, 1865, Virginia insisted in its bill and by counsel in argument that the condition, upon which the incorporation of the counties of Berkeley and of Jefferson depended, had never been fulfilled, inasmuch as there was to be a vote of the inhabitants of the counties, and that the vote, when taken, should be fair. The majority of the Court, however, refused to go behind the returns and to consider this phase of the question, inasmuch as the Governor of Virginia, that is to say, the governor of the organization claiming to represent Virginia, was authorized to ascertain and to certify the results of the election under the seal of the State of Virginia to the governor of the State of West Virginia. This was done. As to the legal effect of this provision and the action of the Governor of Virginia in accordance with it, the court said :

Virginia is bound by the action of her Governor.

We are of opinion that the action of the governor is conclusive of the vote as between the States of Virginia and West Virginia. He was in legal effect the State of Virginia in this matter. In addition to his position as executive head of the State, the legislature delegated to him all its own power in the premises. It vested him with large control as to the time of taking the vote, and it made his *opinion* of the result the condition of final action. It rested of its own accord the whole question on his judgment and in his hands. In a matter where that action was to be the foundation on which another sovereign State was to act—a matter which involved the delicate

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 58–9).
[2] *Ibid.* (11 Wallace, 39, 49).

question of permanent boundary between the States and jurisdiction over a large population—a matter in which she took into her own hands the ascertainment of the fact on which these important propositions were by contract made to depend, she must be bound by what she has done. She can have no right, years after all this has been settled, to come into a court of chancery to charge that her own conduct has been a wrong and a fraud; that her own subordinate agents have misled her governor, and that her solemn act transferring these counties shall be set aside, against the will of the State of West Virginia, and without consulting the wishes of the people of those counties.[1]

The question of withdrawal from the agreement therefore does not arise.

In view of this provision of the law, the action of the governor of Virginia in pursuance of it relieved the majority of the court, for whom Mr. Justice Miller spoke, from the necessity of considering the legal effect of the act of December 5, 1865, by which Virginia sought to withdraw the various acts of consent and the legal effect of compliance with them; and the judgement of the court therefore was that the demurrer of West Virginia to the bill was sustained and the bill itself dismissed.

Demurrer sustained and bill dismissed.

Dissenting opinions.

The minority of the court, represented by three of its members, dissented from the opinion of the majority in one very material respect, which, if justified, would have decided the case in favour of Virginia instead of West Virginia. The dissent was limited to the single point, whether Virginia could or could not withdraw its consent by the statute of December 5, 1865, before the consent was given by Congress in its act of March 2, 1866. On all other points the minority apparently agreed with the majority, as Mr. Justice Davis, on behalf of his brethren, Clifford and Field, said:

There is no difference of opinion between us in relation to the construction of the provision of the Constitution which affects the question at issue. We all agree that until the consent of Congress is given, there can be no valid compact or agreement between States. And that, although the point of time when Congress may give its consent is not material, yet, when it is given, there must be a reciprocal and concurrent consent of the three parties to the contract. Without this, it is not a completed compact. If, therefore, Virginia withdrew its assent before the consent of Congress was given, there was no compact within the meaning of the Constitution.[2]

Mr. Justice Davis next takes up and meets the statement of the majority, that the act of Congress admitting West Virginia as a State of the Union was a ratification of the provision of the Constitution of that State admitting the two counties upon their vote in favour of admission. On this point Mr. Justice Davis, speaking for his brethren, said:

But, it is maintained in the opinion of the court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia, when it admitted West Virginia into the Union. The argument of the opinion is, that Congress, by admitting the new State, gave its assent to that provision of the new constitution which looked to the acquisition of these counties, and that if the peoples of these counties have *since* voted to become part of the State of West Virginia, this action is within the consent of Congress. I most respectfully submit that the facts of the case (about which there is no dispute), do not justify the argument which is attempted to be drawn from them.

The second section of the first article of the constitution of West Virginia was merely a proposal addressed to the people of two distinct districts, on which they were invited to act. The people of one district (Pendleton, Hardy, Hampshire, and Morgan)

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 62–3).
[2] *Ibid.* (11 Wallace, 39, 63–4).

accepted the proposal. The people of the other district (Jefferson, Berkeley, and Frederick) rejected it.

In this state of things, the first district became a part of the new State, so far as its constitution could make it so, and the legislature of Virginia included it in its assent, and Congress included it in its admission to the Union. But neither the constitution of West Virginia, nor the assent of the legislature of Virginia, nor the consent of Congress, had any application whatever to the second district. For though the second section of the first article of the new constitution had proposed to include it, the proposal was accompanied with conditions which were not complied with; and when that constitution was presented to Congress for approval, the proposal had already been rejected, and had no significance or effect whatever.[1]

23. State of Missouri v. State of Kentucky.

(11 Wallace, 395) 1870.

A boundary dispute

The case of *Missouri* v. *Kentucky*, decided in 1870, was a boundary dispute, but not of the ordinary kind, and the question raised by the pleadings was as interesting as it was important, and is as applicable to nations of the society of nations as to states of the American Union.

turning on the shifting of a river channel.

In simplest terms, it involved the question whether the change of channel in the Mississippi, admittedly the boundary between the two States, changed the boundary, that is to say, whether the boundary between the States followed the river in its wanderings, or whether the boundary remained although the river was minded to change its channel.

Summary of the facts.

The possession of a tract of land known as Wolf Island depended upon this question, for, in 1820, when Missouri was admitted as a state, with its eastern boundary the middle of the river, Wolf Island lay to the east of the main channel, and therefore within the sovereignty of Kentucky, whereas, at the time of the suit, the main channel of the river was to the east of the island, which was therefore claimed by Missouri as within its sovereign jurisdiction. To determine this question, the two States appeared at the bar of the Supreme Court.

The case is thus stated in the official report within the compass of two paragraphs:

The state of Missouri brought here, in February, 1869, her original bill against the State of Kentucky, the purpose of the bill being to ascertain and establish, by a decree of this court, the boundary between the two States at a point on the Mississippi River known as Wolf Island, which is about twenty miles below the mouth of the Ohio. The State of Missouri insisted that the island was a part of her territory, while the State of Kentucky asserted the contrary. The bill alleged that both States were bounded at that point by the main channel of the river, and that the island, at the time the boundaries were fixed, was and is on the Missouri side of said channel.

The answer stated that Kentucky, formed out of territory originally embraced within the State of Virginia, was admitted into the Union on the 1st day of June, 1792, and that she had always claimed her boundary on the Mississippi to the middle of the river, and Wolf Island to be within her jurisdiction and limits as derived from Virginia; a part of Hickman County, one of the counties of Kentucky, opposite to which it lay, and it denied that the island belonged to Missouri, or that the main channel was on the eastern side of it when the boundaries of the States were fixed.[2]

[1] *State of Virginia* v. *State of West Virginia* (11 Wallace, 39, 63–5).
[2] *State of Missouri* v. *State of Kentucky* (11 Wallace, 395, 395–6).

Decision of the Court in favour of Kentucky.

Mr. Justice Davis, who dissented in the case of *Virginia* v. *West Virginia* (11 Wallace, 39), on this occasion spoke for the Court, which was unanimous. It is to be observed, in the first place, that although counsel for Kentucky raised the question of jurisdiction, the Court took no notice of it in its opinion, not even mentioning it to brush it aside. This was no doubt due to the fact that this question had been fully argued, discussed, and passed upon by the Court, in *Virginia* v. *West Virginia*, although the opinion in that case had not then been announced. In the second place it will be observed that Mr. Justice Davis was unwilling, as all members of the Court have been, to discuss or decide questions not called for by the case, that he refused to announce a general principle, divorced from the facts, as decisive of the question, and preferred to find the facts as stated in the treaties of contracting nations, making the Mississippi the boundary between them, and from the facts as found to decide the case. This he does, showing the point of view of the Court and the principle to be adopted in the opening words of his opinion :

History of the boundaries.

It is unnecessary, for the purposes of this suit, to consider, whether, on general principles, the middle of the channel of a navigable river which divides coterminous States, is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain and England, in February, 1763, stipulated that the middle of the River Mississippi should be the boundary between the British and French territories on the continent of North America. And this line, established by the only sovereign powers at the time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain of 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836. And Kentucky succeeded, in 1792, to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi River. It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner.[1]

The shifting of the channel does not affect the title.

This practically decides the question, or it makes it, as previously stated, one of fact, to be proved as in a case between private parties. The learned Justice states that Virginia claimed the ownership of the island as early as 1782, and that its successor in title, the State of Kentucky, succeeded to this claim, and for many years prior to the announcement of the suit was 'in the actual and exclusive possession of the island, exercising the rights of sovereignty over it'.[2] In support of this statement, he adds that the island lies opposite to and forms a part of Hickman County, that the lands embraced in the island were in 1837 surveyed under the authority of Kentucky, and have been sold and conveyed to purchasers under the authority of that State, that the people residing on the island paid taxes and voted according to the laws of Kentucky, and he concludes that 'this possession, full established by acts like these, has never been disturbed'.[3]

Kentucky has always maintained possession.

[1] *State of Missouri* v. *State of Kentucky* (11 Wallace, 395, 401).
[2] *Ibid.* (11 Wallace, 395, 402).
[3] *Ibid.* (11 Wallace, 395, 402).

As regards the other party to the suit, he says :

If Missouri has claimed the island to be within her boundaries, she has made no attempt to subject the people living there to her laws, or to require of them the performance of any duty belonging to the citizens of a State. Nor has there been any effort on her part to occupy the island, or to exercise jurisdiction over it.[1]

And in a later portion of his opinion, which may be said to close this phase of the question, he remarks :

There is, therefore, nothing in this record which shows that Kentucky has not maintained, for a long course of years, exclusive possession and jurisdiction over this territory and the people who inhabit it.[2]

The learned Justice, however, knew that the assertion of jurisdiction on the part of Kentucky, and the failure on the part of Missouri to do so, was not decisive of the right of either State, although it was very strong testimony in support of a claim of right. As he very properly said, 'it remains to be seen whether she shall remain in possession and continue to exercise this jurisdiction, or whether she shall give way to Missouri'.[3]

He likewise admitted that the case was not free from difficulty, but, speaking for his brethren, he said that the difficulties could be removed 'by a fair examination of the testimony, and the rights of the contestants properly determined'.[4]

Evidence of witnesses.

The first kind of evidence to which the Court resorted, was the testimony of persons living in the region of the controversy and engaged in navigation of the river. When the river was full, the Kentucky channel, that is to say, the portion of the River flowing between Wolf Island and Kentucky, afforded a safe passage for boats, 'because', as the learned Justice says, 'at such a time, if the obstructions were not submerged they could be avoided, and navigators would take it as it was five miles the shortest'.[5] He stated, on behalf of the Court, that this channel was admittedly the highway at the date of the suit, but, as the Justice was careful to add, 'the point to be determined is, was it so as far back as 1763, or even 1820'?[6]

The testimony of witnesses established in the opinion of the Court the fact 'that in early times it was difficult for flatboats, even in the highest stage of water, to get into the Kentucky chute, owing to the current running towards the Missouri side, and that if they succeeded in doing it, the navigation was obstructed on accouut of the narrow and crooked condition of the stream',[7] that, as said by one of the witnesses, 'in low water any one could have got to the island from the Kentucky shore without wetting his feet, by crossing the small streams on the drift-wood',[8] that in 1825, although the channel between Kentucky and the island had improved, 'still in the low water of that year it did not have a depth of over two and a half feet nor a width exceeding one hundred and fifty yards, while steamboats passed through the Missouri channel without any difficulty'.[9]

The testimony appeared to the Court to establish the fact that the channel of the river between the island and the State of Missouri, the west channel, as it is called, was wider and deeper than that to the east of the island, that it was used by navigators as the ordinary channel, and that the highway to the east was at that time

[1] *State of Missouri* v. *State of Kentucky* (11 Wallace, 395, 402).
[2] *Ibid.* (11 Wallace, 395, 413). [3] *Ibid.* (11 Wallace, 395, 403). [4] *Ibid.* (11 Wallace, 395, 403).
[5] *Ibid.* (11 Wallace, 395, 404). [6] *Ibid.* (11 Wallace, 395, 405). [7] *Ibid.* (11 Wallace, 395, 405).
[8] *Ibid.* (11 Wallace, 395, 405). [9] *Ibid.* (11 Wallace, 395, 405–6).

only used on extraordinary occasions. 'Indeed,' the Court says, 'the concurrent testimony of all the persons engaged in the navigation of the river is, that they could never safely go east of the island, unless in high water, and that they uniformly took the west channel in dry seasons'.[1] The Court attributed very great weight to the testimony of the boatmen, for the reason that 'this class of men would naturally take risks in order to save five miles of navigation'.[2]

There was, however, another and a very interesting class of testimony to which the Court next adverted, a class of testimony which did not depend upon the memory of witnesses. It is thus summarized and stated by Mr. Justice Davis:

Physical evidence.

But there is additional proof growing out of certain physical facts connected with this locality which we will proceed to consider. Islands are formed in the Mississippi River by accretions produced by the deposit at a particular place of the soil and sand constantly floating in it, and by the river cutting a new channel through the mainland on one or the other of its shores. The inquiry naturally suggests itself, of which class is Wolf Island? If the latter, then the further inquiry, whether it was detached from Missouri or Kentucky. The evidence applicable to this subject tend strongly to show that the island is not the result of accretions, but was once a part of the mainland of Kentucky. Islands formed by accretions are, in river phraseology, called made land, while those produced by the other process necessarily are of primitive formation. It is easy to distinguish them on account of the difference in their soil and timber.

It has been found, by observation and experience, that primitive soil produces trees chiefly of the hard-wood varieties, while the timber growing on land of secondary formation—the effect of accretions—is principally cottonwood. Wolf Island is of large area, containing about fifteen thousand acres of land, and, with the exception of some narrow accretions on its shores, is primitive land, and has the primitive forest growing on it.

On the high land of the island there are the largest poplar, oak, and black-kack trees growing, and primitive soil only has the constituent elements to produce such timber. But this is not all, for trees of like kind and size are found on the Kentucky side on what is called the second bottom, near the foot of the Iron Banks, which is about two feet higher than the bottom on which Columbus is located. There are no such trees on the Missouri shore. Those found there are of a different kind and much smaller growth. Besides this, the high land on the island is on the same level with the second bottom on the Kentucky side, while it is four or five feet higher than the land on the Missouri side opposite the island and above it. In this state of the case, it would seem clear that this second bottom and island were once parts of the same table of land, and, at some remote period, were separated by the formation of the east channel. In the nature of things, it is impossible to tell when this occurred, nor is it necessary to decide that question, for, by the memory of living witnesses, we are enabled to determine that the east channel, or cut-off, as it should be called, was not the main channel down to 1820.[3]

The Court next indulges in an explanation of the reason why the Mississippi, flowing west of the island, should have travelled eastward, and this explanation it finds in the fact that the river, striking the hard bank of the Kentucky side, just above the island, was naturally deflected to the west, but that, in the course of time, it ate away the hard soil of the Kentucky bank, extending into its waters, and thereafter flowed in a straight line to the east of the island instead of being deflected to the west, and thus flowing to the west of the island.

[1] *State of Missouri* v. *State of Kentucky* (11 Wallace, 395, 407).
[2] *Ibid.* (11 Wallace, 395, 407).
[3] *Ibid.* (11 Wallace, 395, 407–8).

Finally, the Court referred to the maps of the early explorers of the river and the reports of travellers, which the State of Missouri had introduced in order to prove that the channel of commerce was always to the east of the island. On this point, the language of the Court deserves to be quoted, as the makers of maps are, after all, only witnesses, and travellers only record what they see or find, or should only do so, and, as such, are but witnesses. Value of maps as evidence.

The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses, based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle, to dispossess a party of property on the mere statements—not sworn to—of travellers and explorers, when living witnesses, testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them ? [1]

So much for the books and the maps subsequent to 1800. Missouri, however, did not rest its case upon their testimony. It appealed to documents of an earlier date. But this evidence fared little better, because it was opposed to the testimony not of makers of maps and of travellers of a more recent date, but to the conclusions of disinterested and scientific experts, who had, in the course of their professional employment, examined the region in controversy. Thus, to quote for the last time the language of Mr. Justice Davis :

But, it is claimed that the books and maps, which antedate human testimony, establish the right of the Missouri to this island. If this be so, there is recent authority for saying they are unreliable. In 1861 Captain Humphreys and Lieutenant Abbott, of the corps of Topographical Engineers, submitted to the proper bureau of the War Department, a report based on actual surveys and investigations, upon the physics and hydraulics of the Mississippi River, which they were directed to make by Congress. In speaking on the subject of the changes in the river, they say : 'These changes have been constantly going on since the settlement of the country, but the old maps and records are so defective, that it is impossible to determine much about those which occurred prior to 1800.' In the face of this report, authorized by the government, and prepared with great learning and industry, how can we allow the books and maps published prior to this century, to have any weight in the decision of this controversy ? [2]

The bill was therefore dismissed, with the result that Wolf Island remained, after as before the creation and admission of Missouri as a State, in the possession and sovereignty of Kentucky. Bill dismissed.

24. State of South Carolina v. State of Georgia.

(93 U.S. 4) 1876.

The next case to be considered, that of *South Carolina* v. *Georgia* (93 U.S. 4), was decided in 1876, six years after the case of *Missouri* v. *Kentucky*. In the exercise of their sovereignty under the Articles of Confederation in the very year 1787 in which a more perfect union of the States was drafted in a Convention of the States, South

[1] *State of Missouri* v. *State of Kentucky* (11 Wallace, 395, 410).
[2] *Ibid.* (11 Wallace, 395, 411).

Bill to restrain federal interference with the course of the Savannah River.

Carolina and Georgia had entered into a compact concerning the navigation of the Savannah River, which, in the opinion of South Carolina, was being violated by the State of Georgia, Alonzo Taft, Secretary of War, and their agents and subordinates. To prevent this, South Carolina filed its bill in the Supreme Court of the Union praying for an injunction to restrain them, to quote the language of the record, 'from "obstructing or interrupting" the navigation of the Savannah River, in violation of the compact entered into between the States of South Carolina and Georgia on the twenty-fourth day of April, 1787.' [1]

The States of South Carolina and Georgia are contiguous, and they are separated on the east and the west by the Savannah River, and, because of this fact, it was important to them in 1787, as it is now, that the navigation of the river should be free to the inhabitants of both, and that no obstruction should be made to its navigation by either of the states or the inhabitants thereof.

The second article of the compact, dealing with this phase of the question, and upon which the suit was based, is thus worded :

Art. 2. The navigation of the river Savannah, at and from the bar and mouth, along the north-east side of Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of the said island, and from thence up the bed or principal stream of the said river to the confluence of the rivers Tugoloo and Keowee, and from the confluence up the channel of the most northern stream of Tugoloo River to its source, and back again by the same channel to the Atlantic Ocean, is hereby declared to be henceforth equally free to the citizens of both States, and exempt from all duties, tolls, hindrance, interruption, or molestation whatsoever attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia.[2]

Cause of the suit.

The cause of the suit was the passage of an act of Congress in 1874, appropriating $50,000, and a second act of Congress of the ensuing year, devoting $70,000, 'for the improvement of the harbor at Savannah.' The geographical situation and the local conditions necessary to a comprehension of the case are thus stated in the official report :

The Savannah River, where it flows past the city of Savannah, is divided into two channels by Hutchinson's Island, which extends above and below the city with a length of about six miles, and a width, where widest, of one mile or more. Of these channels, the more northerly is known as Back River, whilst that which passes immediately by the city of Savannah is called Front River.

The improvement consists in the construction of a crib dam at a point known as the 'Cross Tides', for the purpose, by diverting a sufficient quantity of the water passing through the Back River into the Front River channel, of securing to the city a depth of fifteen feet at low water.

To prevent work under the authority of the Act of Congress affecting the flow of the river at Savannah, the State of South Carolina filed its bill against the State of Georgia, the Secretary of War and their agents, in order to restrain them from undertaking what they believed would be for the improvement of the harbor of Savannah.

On this state of facts, the case was presented to the Supreme Court, and its first act was to exclude from consideration the compact of 1787 between the States, as it

[1] *State of South Carolina* v. *State of Georgia* (93 U.S. 4, 5).

[2] *Ibid.* (93 U.S. 4, 5–6).

was superseded by the newer compact called the Constitution, by virtue of which the States granted to the creation of their hands, the United States, the right to 'regulate commerce with foreign nations, and among the several States'.

Mr. Justice Strong delivered the opinion of the Court, unanimous as in the preceding case, and saying:

Decision of the Court against South Carolina.

We do not perceive that, in this suit, the State of South Carolina stands in any better position than that which she would occupy if the compact of 1787 between herself and Georgia had never been made . . . Undoubtedly this assured to the citizens of the two States the free and unobstructed navigation of the channel described, precisely the same right which they would have possessed had the original charters of the two provinces, Georgia and South Carolina, fixed the Savannah River as the boundary between them.[1]

The learned Justice was undoubtedly correct in that observation, but he did not stand upon such solid ground when he proceeded to say:

It needed no compact to give to the citizens of adjoining States a right to the free and unobstructed navigation of a navigable river which was the boundary between them.[2]

His remark would have been beyond criticism if he had limited himself to the statement that it should not need a compact for such purposes.

The next passage of his opinion, however, is not open to the criticism, even of the most captious, nor subject to modification, and, as it states the changed relations of the States, brought about by the compact of all, and holds navigation to be incident to commerce and included within the power to regulate it, this portion of the opinion of the learned Justice is quoted in his own language:

Delegation of rights to the United States.

But it matters not to this case how the right was acquired, whether under the compact or not, or what the extent of the right of South Carolina was in 1787. After the treaty between the two States was made, both the parties to it became members of the United States. Both adopted the Federal Constitution, and thereby joined in delegating to the general government the right to 'regulate commerce with foreign nations, and among the several States'. Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as between themselves or against others, they both agreed that Congress might thereafter do everything which is within the power thus delegated. That the power to regulate inter-State commerce, and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States,—rivers that are accessible from other States, at least to the extent of improving their navigability—has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the government, it has been so understood and determined. Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to 'regulate

[1] *State of South Carolina* v. *State of Georgia* (93 U.S. 4, 8–9). [2] *Ibid.* (93 U.S. 4, 9).

commerce ', conferred by the Constitution upon Congress, is that which previously existed in the States.[1]

The United States, succeeding to the rights of the States in this matter, could therefore exercise the rights which the learned Justice had declared South Carolina and Georgia competent to exercise before the Constitution. In view of the somewhat full statement of the rights which the State previously possessed, it is unnecessary to deal further with this phase of the question, although it is advisable to quote the language of *Gilman* v. *Philadelphia* (3 Wallace, 724), upon which the Court relies, and which Mr. Justice Strong quoted in its behalf :

Regulation of commerce includes navigation.

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise ; to remove such obstructions where they exist ; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament of England.[2]

This might appropriately have ended the case, because, if the Congress of the United States has the right to regulate commerce between the States, including therein navigation, and, if the Congress passed an act in the interest of commerce between the States and improved navigation in order to facilitate commerce, the Secretary of War, to whose department the improvements in question belonged, was authorized to undertake the improvements, inasmuch as the Congress stood in the position of the States before the grant of power, and the Secretary of War was their agent. The only question that could arise was not whether improvements could be made, but whether they were what they claimed to be, or were really obstructions to commerce and to navigation in the guise of improvements. The Court, therefore, thus addressed itself to this phase of the subject, saying, through Mr. Justice Strong :

Obstruction may be a means of improvement.

But it is insisted on behalf of the complainant, that, though Congress may have the power to remove obstructions in the navigable waters of the United States, it has no right to authorize placing obstructions therein ; that while it may improve navigation, it may not impede or destroy it. Were this conceded, it could not affect our judgment of the present case. The record exhibits that immediately above the city of Savannah the river is divided by Hutchinson's Island, and that there is a natural channel on each side of the island, both uniting at the head. The obstruction complained of is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern, by increasing the flow of the water through the former, thus increasing its depth and water-way, as also the scouring effects of the current. The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the water-way of one of its channels, and compelling navigation to use the other channel ; but is it a means employed to render navigation of the river more convenient,—a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction.

[1] *State of South Carolina* v. *State of Georgia* (93 U.S. 4, 9–10). [2] *Ibid.* (93 U.S. 4, 10).

It might be a lighthouse erected on a submerged sand-bank, or a jetty pushed out into the stream to narrow the water-way, and increase the depth of water and the direction and the force of the current, or the pier of a bridge standing where vessels now pass, and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense, obstructions to navigation ; but, so far as they tend to facilitate commerce, it is not claimed that they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains ? All of them are obstructions to the natural flow of the river, yet all, except the pier, are improvements to its navigability, and consequently they add new facilities to the conduct of commerce.[1]

The learned Justice, however, was unwilling to concede that Congress did not have the power to place obstructions, should it desire to do so, because possessed of the power of the States which could do what they could have done before and they could have placed obstructions, but would not, and therefore the Congress should not place them in such a way as to injure their interests. On this point, Mr. Justice Strong said :

It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build lighthouses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over inter-State and foreign commerce is concerned, this is not to be doubted. Might not the States of South Carolina and Georgia, by mutual agreement, have constructed a dam across the cross-tides between Hutchinson and Argyle Island, and thus have confined the navigation of the Savannah River to the southern channel ? Might they not have done this before they surrendered to the Federal government a portion of their sovereignty ? Might they not have constructed jetties, or manipulated the river, so that commerce could have been carried on exclusively through the southern channel, on the south side of Hutchinson Island ? It is not thought that these questions can be answered in the negative. Then why may not Congress, succeeding, as it has done, to the authority of the States, do the same thing ? Why may it not confine the navigation of the river to the channel south of Hutchinson's Island ; and why is this not a regulation of commerce, if commerce includes navigation ? We think it is such a regulation.[2]

But, as has been stated more than once in the course of this analysis, the government of the United States is a government of laws, not of men, and it cannot follow that men in authority may interpose an obstacle to commerce merely by calling it an improvement. Whether an alleged improvement is in fact an obstruction, and, instead of facilitating commerce and navigation, destroys either or both, is a question of fact to be ascertained in a judicial proceeding at the behest of the parties in interest. The learned Justice, therefore, was unwilling to rest his case upon showing power in the Congress to regulate commerce. The Court wanted to show and did, in the succeeding portion of the opinion, that the question involved was judicial and that there was judicial precedent for the authority claimed. Mr. Justice Strong therefore appealed to the case of *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.* (18 Howard, 421), decided in 1856, which he declared to be instructive, holding as it did that the power of Congress to regulate commerce included the regulation of

[1] *State of South Carolina* v. *State of Georgia* (93 U.S. 4, 11). [2] *Ibid.* (93 U.S. 4, 11–12).

intercourse and navigation and, ' consequently, the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation.' [1]

The Court therefore held in the Wheeling case that ' an act of Congress declaring a bridge over the Ohio River, which in fact did impede steamboat navigation, to be a lawful structure, and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce.' [2]

Question of preference given to Georgia.

The Wheeling case, however, was important for another reason and material to the opinion of the Court in the case under consideration. It had been contended in the present case that closing the portion of the Savannah river flowing between Hutchinson Island and South Carolina, was, in effect, a preference given to the ports of Georgia, a preference forbidden in express terms by the 9th section of Article 1 of the Constitution, providing that ' no preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.'

The Wheeling case was an authority on this very question, inasmuch as it held, to quote Justice Strong's summary of it, 'that the prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another, such as the improvement of rivers and harbours, the erection of light-houses, and other facilities of commerce,' [3] a statement borne out by the exact language of the Court in the Wheeling case, which had said on this point :

It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power.[4]

Finally, the State of South Carolina insisted that if Congress had the power to authorize the work in the harbour in progress as well as in contemplation, resulting in the diversion of the water from the northern channel between Hutchinson Island and South Carolina, to the southern channel, wholly in Georgia, Congress had not exercised the power and given authority to do the acts in question. The Court, however, was of the opinion that the appropriation of money by the Congress for the improvement of the harbour to Savannah was in itself an authorization to make the improvements, and that in default of explicit directions contained in the acts themselves the Secretary of War was authorized to expend the money on improvements in the harbour of Savannah, and to prescribe the improvements to be made, provided, however, they should be found in fact to be improvements.

This was, of course, a question of fact to be determined in case of need by the intervention of the Court, and on this important point, the Court said :

We know judicially the fact that the harbor is the river in front of the city, and the case, as exhibited by the pleadings, reveals that the acts of which the plaintiff complains tend directly to increase the volume of water in the channel opposite the city, as well as the width of the waterway. Without relying at all upon the report of the engineers, which was before Congress, and which recommended precisely what was done, we can come to no other conclusion than that the defendants are acting

[1] *State of South Carolina* v. *State of Georgia* (93 U.S. 4, 12).
[2] *Ibid.* (93 U.S. 4, 12).
[3] *Ibid.* (93 U.S. 4, 13).
[4] *Ibid.* (93 U.S. 4, 13).

within the authority of the statutes, and that the structure at the cross-tides intended to divert the water from the northern channel into the southern is, in the judgment of the law, no illegal obstruction.[1]

This being so, the Court held that the State of South Carolina had not made out such a case as would authorize the Court to restrain the State of Georgia and the defendants from continuing the improvements. It is interesting to note, however, the exact language of Mr. Justice Strong, as showing the unwillingness of the Court to express an opinion in suits between States which was not called for by the circumstances of the case, lest it might seem to question the right in general of a State to bring suit in the Supreme Court. Thus, Mr. Justice Strong said :

The plaintiff has, therefore, made no case sufficient to justify an injunction, even if the State is in a position to ask for it.[2]

Injunction refused.

And, bearing upon this very important matter, Mr. Justice Strong further said, speaking for the Court :

But, in resting our judgment upon this ground, we are not to be understood as admitting that a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court. Upon that subject, we express no opinion. It is sufficient for the present case to hold, as we do, that the acts of the defendants, of which South Carolina complains, are not unlawful, and consequently that there is no nuisance against which an injunction should be granted.[3]

25. State of New Hampshire v. State of Louisiana.

(108 U.S. 76) 1883.

The case of *New Hampshire* v. *Louisiana* (108 U.S. 76), decided in 1883, is similar to, indeed identical with, that of *New York* v. *Louisiana*, tried at the same time, and because of this fact the two were considered as one case by the court. The facts in these cases have already been stated and the decision examined in connexion with the attempt made by individuals to circumvent the letter of the 11th amendment.[4] They certainly were opposed to its spirit.

It is sufficiently clear, from the twenty-three cases already considered in which the Supreme Court assumed jurisdiction, that it would have taken jurisdiction in the present instance if the controversy presented to the Court had really been one between the States as such—for in suits between States the parties, not the subject matter, give jurisdiction. The Court, however, found that the cases, between States in form, was in substance between a State on the one hand and citizens of different States on the other. In its rôle of protector of the rights of sovereign states against suit where they have not consented to be sued, the Court refused to assume jurisdiction, or rather, it entertained jurisdiction in order to determine whether the controversy was between the States, and dismissed the suits when satisfied that the States were being imposed upon. Recognizing that it was a Court of limited jurisdiction, it restrained itself with the limits assigned it by the Constitution, although, as an international tribunal, it might have assumed jurisdiction of the controversy, as by

[1] *State of South Carolina* v. *State of Georgia* (93 U.S. 4, 13–14).
[2] *Ibid.* (93 U.S. 4, 14). [3] *Ibid.* (93 U.S. 4, 14). [4] *Ante*, pp. 63–7.

the law of nations the nation may espouse the claim of its subject or citizen and appear as trustee in his behalf. But the refusal of the Supreme Court to forsake the beaten track of precedent, even although it would enhance its prestige and enlarge its usefulness, was a guarantee to the States of the Union that their interests could safely be entrusted to a court of their creation, and the decision in these two cases is likewise a guarantee to the States of the larger society that a tribunal of their creation can be kept within the bounds assigned to it in the convention creating it, because of the action of the Supreme Court in this very matter.

Bonds of Louisiana assigned by the holders to New Hampshire

Briefly stated, the facts were that sundry citizens of the State of New Hampshire held bonds of the State of Louisiana which were overdue and unpaid and which that state was unwilling to pay. The holders of the bonds upon which suit was brought assigned them to the State of New Hampshire for the express purpose of putting them in suit, in accordance with a statute of the State of New Hampshire passed July 18, 1879. The Attorney-General was, by this act, authorized to bring suit in the name of New Hampshire in the Supreme Court of the United States against the State of Louisiana, to associate with him in the prosecution thereof the assignor and his counsel, and from the proceeds of suit, or compromise if made, to deduct the expenses and to remit the balance to the citizen of the State who had assigned the bonds for the purpose of suit.

and to New York respectively.

In all its essentials the act of May 15, 1880, passed by the State of New York, was identical in substance, if slightly dissimilar in form.

On this state of facts the two cases were before the Court, which, whether the question of jurisdiction is raised or not by the defendant state and its counsel, tests the cases made by the pleadings in order to determine for itself whether it should, as a court of limited jurisdiction, entertain them, apparently as careful of its reputation as Caesar is said to have been of the reputation of his wife.

The very first words of Chief Justice Waite, after stating the case, were :

Decision of the Court dismissing the suits

The first question we have to settle is whether, upon the facts shown, these suits can be maintained in this court.[1]

After quoting the provision of the Constitution extending the judicial power of the United States to 'Controversies between two or more States', and 'between a State and Citizens of another State' ; and the further provision of the Constitution that in cases 'in which a State shall be a party the Supreme Court shall have original jurisdiction', the Chief Justice referred to and discussed in detail the case of *Chisholm* v. *Georgia* (2 Dallas, 419), decided in 1793, in order to show that the jurisdiction assumed by the Court in that case of a citizen against a State of the Union had been withdrawn by the 11th amendment, so that if the real parties to this suit were citizens of New Hampshire and of New York the spirit of the amendment would be violated if the court gave the plaintiffs a hearing.

on the ground that title did not pass to the States.

From an examination of the facts of the two cases the Court came to the conclusion that title did not pass from the citizens to the States, so that the individuals lost their interest and the states became the only parties of interest in the transaction, leaving untouched and to be decided as it arose the case of a gift from the citizens of a State vesting it with title without reservation of interest on their part—a case which arose and of which the Supreme Court entertained jurisdiction in the compara-

[1] *State of New Hampshire* v. *State of Louisiana* (108 U.S. 76, 86).

tively recent case of *South Dakota* v. *North Carolina* (192 U.S. 266), decided in 1904. Closing with a reference to *Chisholm* v. *Georgia*, with which the Chief Justice began his opinion, he said, speaking for a unanimous court :

In the argument of the opinions filed by the justices in the Chisholm case, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and *The bill in each case is dismissed.*[1]

Object of the 11th Amendment.

26. United States v. State of Louisiana.

(123 U.S. 32) 1887.

In the course of this analysis it has been stated, perhaps *ad nauseam*, that a sovereign State cannot be sued without its consent, and the chief purpose of this narrative is to show how such states may give a general consent to suit and the procedure to be followed in the contest of sovereign states with shield and buckler laid aside in a court of justice. The States forming the American Union consented in conference to sue and to be sued, without specifying the subject matter of the suit provided States should be the parties plaintiff and defendant. The United States may sue in the Court of the States, of which it is the agent, and, as has already been seen, in the case of *Florida* v. *Georgia* (17 Howard, 478), the United States asked to be heard and to protect its interests, without, however, becoming a formal party to the suit between those States in the Supreme Court ; and it will presently be seen that the United States has since, in its character of State, availed itself of the Supreme Court in which to litigate, on behalf of the States whereof it is the agent and the trustee, its claim against a State of the Union. Plaintiff it has been and therefore may be. Is it or can it be a defendant ?

Question whether the United States could be sued.

Without arguing the matter in this place, as it will be considered later, it is sufficient to quote, for present purposes, three brief extracts from three famous cases :

In the case of *Cohens* v. *Virginia* (6 Wheaton, 264, 411), decided in 1824, Mr. Chief Justice Marshall said, speaking for a unanimous court :

Various judicial opinions, 1824–94.

The universally received opinion is, that no suit can be commenced or prosecuted against the United States.

In the case of *Beers* v. *Arkansas* (20 Howard, 527, 529), decided in 1857, his eminent successor, Mr. Chief Justice Taney, said :

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission ; but it may, if it thinks proper, waive this privilege, and permit itself to be made defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may

[1] *State of New Hampshire* v. *State of Louisiana* (108 U.S. 76, 91).

prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

And in the case of *Schillinger* v. *United States* (155 U.S. 163, 166), decided in 1894, Mr. Justice Brewer said, in delivering the opinion of the court:

> The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.

The case of the *United States* v. *Louisiana* (123 U.S. 32), decided in 1887, is one of a class in which the United States has given a general consent to be sued, albeit this class is very select, indeed too select for a democracy. In this the question presented itself whether the United States could be sued by a State of the American Union, although it was admitted that an individual like circumstanced could sue, because a statute of Congress has authorized individuals to maintain an action against the United States in the Court of Claims, in which the United States has consented to be sued, and to obtain a judgement including costs against the United States as against individual litigants.

The special facts in the case are not important, as they would justify a judgement against the United States if that body politic could be brought to the bar of justice and be subjected, as any corporation, to the law of the land. But although the question raised in the Court of Claims, and renewed, argued, and debated upon appeal in the Supreme Court, was the question of jurisdiction, it is advisable to recount the facts out of which the case arose, in order that we may, as in all other cases, deal with the concrete rather than the abstract.

Summary of the facts.

A claim against the United States for the proceeds of the sale of certain lands.

The State of Louisiana brought action in the Court of Claims against the United States to recover two demands, amounting in the aggregate to $71,385.83. Both of these demands were based upon acts of Congress, the first passed on February 20, 1811, 'to enable the people of Orleans to form a constitution and state government.' In the fifth section of the act the United States, after the first day of January, 1812, pledged 'five per cent. of the net proceeds of the sales of lands of the United States, within her limits', to be applied to laying out and constructing public roads and levees in the state as the legislature thereof might direct. The five per cent. of the net proceeds of sales of lands of the United States made between July 1, 1882, and June 30, 1886, and due to the State of Louisiana by the United States, as found by the Commissioner of the General Land Office, amounted to $47,530.79.[1]

The second demand arose upon the act of Congress of September 28, 1850, 'to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' and the act of Congress of March 2, 1855, 'for the relief of purchasers and locators of swamp and overflowed lands.' The first of these two acts granted to the States then forming the Union 'all the swamp and overflowed lands, made unfit thereby for cultivation, within their limits, which at the time remained unsold'.[2] The second required the Secretary of the Interior 'to prepare a list of the lands

[1] *United States* v. *State of Louisiana* (123 U.S. 32, 33).

[2] *Ibid.* (123 U.S. 32, 33).

described and transmit the same to the Governor of the State, and at his request to cause a patent to be issued therefor '.[1] This duty was, it seems, not discharged, and many of the lands of the kind specified were sold to other parties by the United States. The second act was designed to correct this wrong, and provided that the purchase money of the lands should be paid over to the State upon proof thereof made to the Commissioner of the General Land Office, who found that, on June 30, 1885, there was due from the United States to the State of Louisiana, on account of sales of swamp lands to individuals made prior to March 3, 1857, the sum of $23,855.04.

The United States pleads the statute of limitations and a set-off for unpaid taxes.

It was objected in the Court of Claims that the demand arising upon the latter acts was barred by the statute of limitations, and that both demands were set off by 'the unpaid balance of the direct tax levied under the act of August 5, 1861, which was apportioned to the State of Louisiana'. The two demands were admitted by the Government and were not contested in the court below, but they were 'credited to the State on account upon the claim of the United States against her for the unpaid portion of the direct tax mentioned '.[2]

The principal objection, however, was that of jurisdiction, on which point Mr. Justice Field, speaking for a unanimous court, said :

Objection taken to the jurisdiction.

It was, also, objected in the Court of Claims, and the objection is renewed here, that the court had no jurisdiction, under the Constitution and laws of the United States, to hear and determine a cause in which the State is a party in a suit against the United States. This object, therefore, must first be examined ; for, if well taken, it will be unnecessary to consider the other questions presented.[3]

The exact language of the learned Justice has been quoted, instead of paraphrased, in order that it might again appear with what care and solicitude the Supreme Court questions a case in which a State is a party, willing to admit the State as a wayfarer but insisting that it shall disclose its true character and its right to enter before it be permitted to enter. Therefore, Mr. Justice Field, on behalf of the Court, devoted his attention to the right of the State to sue, and, after quoting the pertinent clauses of the Constitution, with which the reader is familiar to the point of weariness, and referring to the inevitable 11th amendment as modifying the original grant of judicial power, the learned Justice thus proceeded, making it clear that original did not mean exclusive jurisdiction, and that a State might, if it cared to do so, sue or be sued in an inferior court, although it had a right to stand upon its dignity in the Supreme Court :

As thus modified, the clause prescribes the limits of the judicial power of the courts of the United States. The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends ; for, as already stated, both of the demands in controversy arise under the laws of the United States. Congress has brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is the petitioner draws it within the original jurisdiction of the Supreme Court. The same article of the Constitution, which defines the extent of the judicial power of the courts of the United States, declares, that 'in all cases affecting ambassadors, other public ministers, and consuls, and *those in which a State shall be a party*, the Supreme Court shall have original jurisdiction'. In all other cases, 'the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.' Although

[1] *United States* v. *State of Louisiana* (123 U.S. 32, 33–4).
[2] *Ibid.* (123 U.S. 32, 34).
[3] *Ibid.* (123 U.S. 32, 34–5).

the original jurisdiction of the Supreme Court, where a State is a party, as thus appears, is not in terms made exclusive, there were some differences of opinion among the earlier judges of this court whether this exclusive character did not follow from a proper construction of the article. In a recent case, *Ames* v. *Kansas*, 111 U.S. 449, this question was very fully examined, and the conclusion reached that the original jurisdiction of the Supreme Court, in cases where a State is a party, is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States. In that case, it is true, the action was commenced by the State in one of her own courts, and, on motion of the defendant, was removed to the Circuit Court of the United States, and the question was as to the validity of the removal. The case having arisen under the laws of the United States, it was one of the class which could be thus removed, if the Circuit Court could take jurisdiction of an action in which the State was a party. It was held that the Circuit Court could take jurisdiction of an action of that character, and the removal was sustained.[1]

But this was not conclusive of the matter, because the judiciary act of 1789 used language which could be invoked as an obstacle in the way of the State; and the party to the suit, and the defendant in this case, was not the State in the ordinary sense of the word, or, if such, was not held to be included in the consent of States to be sued. Therefore, Mr. Justice Field took a further and a final step in the argument, saying:

The judiciary act of 1789, it is true, declares that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction'. This clause, however, cannot have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States upon any demand in the Circuit Court, or the Court of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none.[2]

Jurisdiction affirmed by the Court.

Having thus swept aside the objection to its jurisdiction on the ground that the State could only sue, if at all, in the Supreme Court, not in an inferior court, and that the United States, suable at the instance of a private individual, was likewise suable at the instance of that artificial person called a State, the Supreme Court was in a position to take up, and to decide upon its merits, the case as made out in the court below which it had before it on appeal.

The statute of limitations not applicable.

The statute of limitations, interposed as a bar to the suit, gave the court much less trouble, and for obvious reasons, than it gave counsel of the United States in the court below. It is true that, by act of Congress, the Court of Claims cannot take jurisdiction of a case which it is otherwise competent to receive which had arisen more than six years before filing suit; but the statute of limitations applies

[1] *United States* v. *State of Louisiana* (123 U.S. 32, 35–6). [2] *Ibid.* (123 U.S. 32, 36–7).

to an actual not to a prospective claim, and until the claim had been ascertained according to the terms of the statute it could not be said that the State was remiss in bringing action. Clearly, the statute of limitations could not begin to run from the date of the act of Congress of 1850, because the Secretary of the Interior did not set aside the lands, as he was directed to do, and the suitor should not be prejudiced by the negligence of that officer. Again, the statute could not run from the date of the act of 1855, because the amount of money due to the State because of wrongful sales of lands by the United States was to be determined by the Commissioner of the General Land Office ; and, in so far as the present case is concerned, it was only in 1885 that he found the amount to be due for which suit was instituted. Within thirteen months after the determination of this amount the State of Louisiana began its suit in the Court of Claims, and was thus well within the six years during which it could have taken action.

Unpaid taxes cannot be pleaded as a set-off.

Finally, the court took up and disposed in summary fashion of the contention that the unpaid portion of the direct tax imposed by the act of Congress on August 5, 1861, should be set off against the two demands of Louisiana, of which the court had jurisdiction, and which were found to be actually due.

The reason for this was very plain and very simple, for the act of Congress in question imposed an annual direct tax of twenty million dollars upon the United States, and apportioned it to the several States of the Union, directing that the tax should ' be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling houses '. That is to say, an annual tax of twenty millions was imposed and the share of each State was ascertained ; but the proportion, differing in each instance, was not levied upon the States, but indicated the amount which should be levied upon the owners of the land situated within each of the States. It was further provided in the act that the amount of the taxes assessed should ' be and remain a lien upon all lands and other real estate of the individuals who may be assessed for the same during two years after the time it shall annually become due and payable '.[1]

It is true, as pointed out by the learned Justice, that the States were authorized by the act to assume the amounts apportioned to them respectively and to collect the amount of their quota from their inhabitants. Louisiana did not avail itself of this right, and the debt created by the act was a debt of the individuals within the State, not of the State itself ; and without robbing Peter to pay Paul, the unpaid portion of the tax of the people of Louisiana, amounting to $71,385.83, could not be set off against a debt of the United States due the State of Louisiana as such. The judgement of the court below was therefore affirmed, and for the first time in the history of the United States the Supreme Court of the United States assumed jurisdiction in the case of a suit of a State against the United States, and held the United States liable as a State or an individual would have been under like circumstances.[2]

First case of suit by a State against the United States.

[1] *United States* v. *State of Louisiana* (123 U.S. 32, 38).

[2] *United States* v. *Alabama*. *United States* v. *Mississippi*. Appeals from the Court of Claims. Mr. Justice Field : ' The questions presented in these cases are covered by the decision in the case of *The United States* v. *The State of Louisiana* ; and, in conformity with it, the judgments in them must be affirmed. So ordered.' (123 U.S. 39, 437).

27. United States v. State of Louisiana.

(127 U.S. 182) 1888.

Claim of Louisiana for the proceeds of the sale of lands.

The next case to be considered is likewise that of Louisiana against the United States, entitled *United States* v. *Louisiana* (127 U.S. 182), decided in 1887, and the cause of action, like that of the previous case, arose out of the claim to five per cent. on the sales of lands of the United States under the act of Congress of February 20, 1811; and the second claim, as in the previous case, arose out of the act of September 28, 1850, and of the act of March 2, 1855, by virtue whereof the proceeds of the lands sold to the detriment of the States should be credited to them upon approval of the amount involved by the Commissioner of the General Land Office.

The cause of action of the State of Louisiana against the United States is thus stated by Mr. Justice Blatchford, speaking for the Supreme Court, and delivering its unanimous opinion:

The State alleged, in its petitions in the Court of Claims, (for there were two suits, which were consolidated,) that the moneys due to it under the act of 1811, instead of being paid over to it by the United States, had been unlawfully credited upon certain bonds alleged to have been issued by the State, and claimed to be held by the United States as an investment of certain Indian Trust funds; that, as to the acts of 1850 and 1855, moneys were due to the State thereunder, which had been legally ascertained and certified, but, instead of being paid over to the State, had been credited on bonds of the same kind; and that the sums referred to as being ascertained and found due to the State were trust funds, to be devoted to specific purposes, under the provisions of the acts granting them to the State.

Claim of United States to set off the interest due on State bonds.

The United States, in addition to a general traverse, put in a special plea of set-off, alleging that the State was indebted to the United States in the amount of interest which had accrued on bonds issued by the State and held by the United States.[1]

From a judgement for $43,572.71 in favour of Louisiana the United States appealed to the Supreme Court, and the case on appeal turned upon the facts and principles of law applicable to them. The question of jurisdiction had already been settled in the previous case of *United States* v. *Louisiana* (123 U.S. 32), and the acts of Congress interpreted upon which the present case was based, and the method of ascertaining the nature and the amount of the indebtedness determined. It is, as it were, a different phase of the same case, in which other facts were invoked to bar the liability of the United States.

It appeared that in 1884 there was due from the United States, under the heading of the five per cent. fund, to the State of Louisiana the sum of $36,439.69, and under the acts of Congress of 1850 and 1855, concerning the sale of the swamp lands, there was in 1887 due Louisiana from the United States the sum of $7,133.02, making, in all, $43,572.71. If the matter had stopped here there would have been no controversy, as the United States admitted these sums to be due and the right to recover debts of this kind had been established in a previous case. But there was here a defence on the part of the United States of an entirely different character, inasmuch as the United States attempted and succeeded in setting off against its admitted indebtedness to the State a claim as creditor against the State, not the citizens and inhabitants thereof, as in the other case. The United States owned coupon bonds issued by

Distinction between this and the previous case.

[1] *United States* v. *State of Louisiana* (127 U.S. 182, 183–4).

Louisiana amounting to $37,000.00, payable in 1894, known as the Indian Trust bonds, on which the interest from May 1, 1874, to November 1, 1887, was due and outstanding, and amounted to $31,080.00. Inasmuch as the principal of the Indian Trust bonds was payable in 1894 this phase of the question may be eliminated, as the debt was not due in 1887, when the suit was brought. The interest, however, was, and the United States maintained that it should be set off against the two sums amounting to $43,572.71, claimed by the State of Louisiana to be due from the United States. In addition, the illustrious defendant claimed that a part of the sum derived from the five per cent. fund, amounting to $13,602.71, should be deducted from the amount otherwise due to the State, inasmuch as that item, credited on the books of the Treasury Department on May 18, 1879, was not put into suit until February 1, 1887, that is to say, until more than six years after it had been accredited to Louisiana, and that it was therefore barred by the statute of limitations requiring suits of this character to be brought within six years. The contention of the United States, therefore, was that this item should be struck from the account of the United States with Louisiana, reducing it to $29,970.00. It was further insisted that this amount was more than covered by the set-off of $31,080.00, the interest due and unpaid on the Indian Trust bonds issued by Louisiana and held by the United States.

Statute of limitations pleaded by United States.

The Court of Claims rejected both contentions of the United States, holding that the two items arising from the five per cent. fund and the sale of swamp lands were trust moneys, to be held and set aside for special purposes, at first by the United States and by the State after the transfer to it; that the trust had not been disavowed or annulled by Congress and that it was the duty of the executive officers of the United States in charge of the funds to deliver them to the State as a succeeding trustee; that the interest arising from the Indian Trust bonds could not properly be set off against the sums of money accruing to the State because of the Acts of Congress of 1811, 1850, and 1855; and that the item of $13,602.71 was not barred by the statute of limitations.

Judgement of the Court of Claims in favour of Louisiana.

If the holding of the Court of Claims was correct, that the acts of Congress created a trust and that the sums forming the trust were to be paid to the States to be used, and only used, in the performance of the trust, then the contention of the United States would fall of its own weight, that the interest of the Indian Trust bonds should be set off against the two sums of money forming a total of $43,572.71 held by the United States for the account of Louisiana.

Question of a trust

This question was not a new one in the Supreme Court of the United States. It had been passed upon in *Emigrant Co.* v. *County of Adams* (100 U.S. 61), decided in 1879, and upon argument and re-argument the court held, per Mr. Justice Bradley, that the act of Congress of 1850 did not create a trust, that the direction to appropriate funds 'as far as necessary' to the specific purpose for which they were given left the State free to exercise a large discretion as to the extent of the necessity. Again, this very question was considered in *Mills County* v. *Railroad Companies* (107 U.S. 557), decided in 1882, in which the Supreme Court affirmed its decision in the previous case, and from Mr. Justice Bradley's opinion on behalf of the court the following pertinent passage is quoted:

in the light of earlier cases.

Upon further consideration of the whole subject, we are convinced that the suggestion then made, that the application of the proceeds of these lands to the purposes of the grant rests upon the good faith of the State, and that the State may

exercise its discretion as to the disposal of them, is the only correct view. It is a matter between two sovereign powers, and one which private parties cannot bring into discussion. Swamp and overflowed lands are of little value to the government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas, the state governments, being concerned in their settlement and improvement, in the opening up of roads and other public works through them, in the promotion of the public health by systems of drainage and embankment, are far more deeply interested in having the disposal and management of them. For these reasons, it was a wise measure on the part of Congress to cede these lands to the States in which they lay, subject to the disposal of their respective legislatures; and, although it is specially provided that the proceeds of such lands shall be applied, 'as far as necessary,' to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the States alone, when they accepted the grant; and whether faithfully performed or not is a question between the United States and the States; and is neither a trust following the lands nor a duty which private parties can enforce as against the State.[1]

The trust theory, like Banquo's ghost, died hard, for again, in the case of *Hagar* v. *Reclamation District* (111 U.S. 701, 713), decided a year later, the Supreme Court reaffirmed its views on this question, and as the result of long and deliberate consideration held, to quote the language of Mr. Justice Blatchford, that 'the appropriation of the proceeds of the sale of the lands rested solely in the good faith of the State; and that its discretion in disposing of them was not controlled by the condition mentioned in the act, as neither a contract nor a trust following the lands was thereby created'.[2]

Having thus disposed of the question of the trust and having thus held that the money in the possession of the United States was not impressed with the trust, so that it could only be devoted to a particular purpose, Mr Justice Blatchford considered the facts and the holding in the case of *Louisiana* v. *United States*, and thus concluded this portion of the case:

Decision of the Supreme Court allows the plea of a set-off

In accordance with the views of this court in the cases above cited, it must be held that the proceeds of the swamp lands are not subject to a property trust, either in the hands of the United States or in those of the State, in such sense that the claim of the United States upon the State for the overdue coupons on the Indian Trust bonds, involved in the present case, cannot be set-off against the claim of the State to the swamp-land fund.[3]

It will be noted that the act of Congress of 1850 was the only one of the acts construed by the Supreme Court in the cases referred to by Mr. Justice Blatchford. But the acts were of a like nature and for a kindred purpose, and if one did not create a trust none did; and the learned Justice so held on behalf of the court. He likewise held that, six years having elapsed since beginning suit, after the right had accrued to the State of Louisiana to recover from the United States the item of $13,602.71 of the five per cent. fund, this portion of the claim was barred, with the result that the sum of $29,970 thus remaining was more than offset by the $31,080 for coupons which had fallen due on November 1, 1887, before the institution of the suit. The language of Mr. Justice Blatchford is so apt and enlightening, and is in addition the conclusion of the case, that it is here quoted for the benefit of the reader:

and also the plea of limitation.

The same views apply to the provision as to the 5 per cent. fund, in the act of 1811, that it shall be applied to laying out and constructing public roads, and levees

[1] *United States* v. *State of Louisiana* (127 U.S. 182, 189).
[2] *Ibid.* (127 U.S. 182, 190).
[3] *Ibid.* (127 U.S. 182, 192).

in the State, 'as the legislature thereof may direct'; and as to both the 5 per cent. fund and the swamp-land fund, we are of opinion that neither of them is of such a character that the debt due to the United States by the State of Louisiana, for the overdue coupons on the Indian Trust bonds, cannot be set off against the fund which is in the hands of the United States. This being so, it follows that the limitation of § 1069 of the Revised Statutes is a bar against the recovery of the item of $13,602.71 of the 5 per cent. fund, credited May 8, 1879, and that the amount of the set-off of $31,080, for coupons falling due up to November 1, 1887, on the Indian Trust bonds, is a valid set-off against the remaining $29,970, and is more than sufficient to extinguish that item.[1]

Judgement in favour of the United States.

The judgement of the Court of Claims was therefore reversed and the case was remanded to that court with a direction to enter judgement in favour of the United States.

Earlier methods of presenting claims against the United States.

The two cases of Louisiana against the United States are interesting, as showing that the United States may be sued in the Court of Claims, either by a private person or by one of the United States. This was not always so. Before 1855 there was no Court of Claims, and the only way that a person with a legal claim against the United States could obtain redress was by way of petition to the Congress, in accordance with the first amendment to the Constitution, reserving to the people the right 'to petition the Government for a redress of grievance'. In practice, however, the right was one in theory rather than in fact, for, although the claim might have been approved by a department of the Government, the appropriation for its payment had to be made by the Congress, and the Congress, therefore, was the judge of ultimate resort.

Experience has shown, if indeed it were needed, that members of legislative bodies are too busy with law making, not to say with politics, to pass as judges upon claims involving disputed facts and complicated law and that committees of the Congress could not sit with the same poise and the same judgement and the same impartiality as judicial bodies. Easy claims were settled, difficult ones dragged on and through sheer weariness were paid to get them out of the way. Justice was done with a rough hand, if at all. Then again, claims against the United States were recommended by the Government to the Congress and met with the same fate; in some cases they were referred by special act to the district courts of the United States, in order to have the facts ascertained and the principle of law applied. But this method was unsatisfactory to the individual suitor, to the executive department, to the foreign state and to the Congress. Therefore, in 1855, an act was passed 'to establish a Court for the investigation of claims against the United States', appointing three judges to pass upon 'all claims founded upon any law of Congress or upon any regulation of the executive department, or upon any contract, express or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress'. The jurisdiction was broad but not deep, and a provision of the act, requiring the entire record of the case to be submitted to the Congress, practically rendered the act nugatory, because at this time the decisions of the court were advisory and the Congress felt obliged to pass upon the claims as a court of review, in order to determine whether the decision was just in each case and whether the Congress should appropriate the amount required to satisfy the claim.

Establishment of the Court of Claims, 1855.

In 1863 the Court was enlarged by the addition of two members, one of whom

[1] *United States* v. *State of Louisiana* (123 U.S. 32, 192).

should be Chief Justice, and its decisions were no longer to be advisory but to be judgements within the scope of its jurisdiction, although the Congress and the executive departments might refer claims to it to have the facts found, to be reported to the Congress and to the Departments, respectively.

So much for the citizens of the United States. The claims of a foreign government were untouched, but by permitting a foreign claimant to sue the United States in the Court of Claims if the claimant's country allowed a foreigner to sue it in one of its courts, relief was given the departments and Congress from many claims which otherwise would have perplexed them, as in times past, and assured to suitors an impartial finding of fact and a judicial as well as a judicious application of the law.

The Court of Claims, starting very modestly, and still inadequate, as it only allows suit within narrow lines, has grown in confidence ; with such growth it has had its jurisdiction extended, so that its sphere of usefulness is much larger than it originally was. Its decisions are judgements, as are those of other courts, from which an appeal lies to the Supreme Court of the United States, reached by a procedure similar to although somewhat freer than that of other courts, and in every instance according to recognized and definite principles of law. In addition, it still acts in an advisory capacity to the Congress and to the departments. Its jurisdiction is thus defined by section 145 of the Act of March 3, 1911 :

Jurisdiction of the Court of Claims.

Section 145. The Court of Claims shall have jurisdiction to hear and determine the following matters :

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: . . .

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court : . . .

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible. . . .

Section 148. When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents and proofs pertaining thereto, to the Court of Claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action : *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject matter or character, the said court might, under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers,

documents, and proofs pertaining thereto, to the said court for trial and adjudication. . . .

Section 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however*, That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court.[1]

The provisions of the act so far quoted refer to citizens of the United States or to branches of the Government, but foreigners are entitled to their day in court if they bring themselves within the following category:

Aliens may prosecute claims.

Section 155: Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

We must not, however, claim for the United States leadership in the judicial settlement of claims against itself, because it appears to be the rule rather than the exception in civilized states generally, a fact pointed out, as long ago as 1870, by Mr. Justice Nott, late Chief Justice of the Court of Claims, in delivering the opinion of the court in the case of *Brown* v. *United States* (6 Court of Claims Reports, 171, 192):

Practice of other nations.

In the great arrogance of great ignorance, our popular orators and writers have impressed upon the public mind the belief that in this republic of ours private rights receive unequalled protection from the government; and some have actually pointed to the establishment of this court as a sublime spectacle to be seen nowhere else on earth. The action of a former Congress, however, in requiring (*Act, July* 27, 1868, 15 Stat. L., p. 243) that aliens should not maintain certain suits here unless their own governments accord a corresponding right to citizens of the United States, has revealed the fact that the legal redress given to a citizen of the United States against the United States is less than he can have against almost any government in Christendom. The laws of other nations have been produced and proved in this court, and the mortifying fact is judicially established that the government of the United States holds itself, of nearly all governments, the least amenable to the law.

Nevertheless, the fact that a nation, holding itself above the law in disputes with its citizens, should yield to public opinion, and subject itself to suit in the Court of Claims is of good augury, as other nations may perhaps be minded to follow its

[1] *United States Statutes at Large*, 61st Congress, 1909–11, vol. 36, part 1, pp. 1136–8.

example in the international field as it has followed theirs in the domestic domain. And this Court of Claims, although its jurisdiction is restricted, nevertheless shows the advantage of a separate and distinct tribunal in which a nation can be sued. And within the first year of its labours its presiding judge, in the report of its labours to Congress, pointed out the advantages of judicial as distinct from political settlement—for settlement by the legislature or by executive departments is political. In the course of the same report he outlined the sphere of its activities and the method of providing proper procedure, if only we are as intent upon making the judicial settlement of disputes against government a success as we have been intent upon making the judicial settlement between individuals a success. From this report a single passage may be quoted, but it is sufficient for present purposes:

Development of practice in the Court.

As to the business of the court, we are convinced that no one who has not had personal experience on the subject, can have any correct idea of its diversity, its intricacy, its perplexity, the exhausting labor necessary for its investigation, or the large sum of money it involves. Until the institution of this court, there had never been anything like a systematic inquiry into the modes of action by the Government through the executive departments, or the relation in regard to contracts and the liabilities arising therefrom which the Government bore to the citizens. It was inevitable, and it is astonishing that it should not have been sooner perceived, that among twenty-five millions of people, inhabiting the almost boundless territory comprehended by the Union, innumerable questions of the most difficult and delicate nature must have arisen, delays in the decision of which were alike discreditable to the moral sense of the people, and the public faith of the government, of which the people were the foundation. It has been often asserted and proved by the experience of the British Parliament, that legislative bodies are unfitted, by the pressure of great public interests, from careful judicial investigation into private rights. The consequence has been in our country that claims accumulated until their magnitude repressed all willingness to investigate them, and a state of things arose which made it hopeless almost to present a claim against the United States with any prospect of a decision. Such was the condition of affairs when we entered upon the discharge of our duties. Our field of action was entirely new. We had no precedents to guide us. It was necessary at once to adopt some system of rules for the transaction of business. The ordinary rules of practice in courts of law were obviously inapplicable. We were forced to adopt rules in advance of any experience upon the subject, conscious that we should be forced often to modify and sometimes to abrogate them. We found numerous cases involving questions entirely out of the path of ordinary legal investigation, requiring a degree of care and study rarely necessary in courts of justice. Cases of contracts, intricate in their details, imperfectly defined by the evidence, reducible with difficulty to any legal principles, and enormous in amount, met us at the threshold. Cases involving the proper construction of treaties, important questions of public law, and that most difficult and delicate of all questions, the responsibility of the United States to their citizens, were laid before us. The construction of acts of Congress, the legitimate powers of the executive departments, the duties and liabilities of Government officers, the constitutional powers of the general government, the duties of neutral nations, and questions arising out of a state of war, were all, directly or incidentally, to be inquired into. It cannot be presumed that, with a due regard to our own reputation or to our official oaths, we were disposed to pass lightly upon questions of such momentous importance. Our object has been to give each case such a degree of care and patient attention as would enable us to use it as a precedent in subsequent cases of a like character. Our desire has been, not to get rid of the cases, but to decide them; and in order to do that they must be carefully examined.[1]

[1] 17 Court of Claims Reports, 6, 7.

The foreign offices of the world are full of grievances, are full of disputes, are full of cases against the members of the society of nations, and if a court of claims or if a court of the society existed, which could take jurisdiction of claims, not prosecuted by the individual but by the State, or if by the individual only with the consent of his government, this court would not suffer from lack of business. Indeed, as the late Baron Marschall von Bieberstein said at the Second Hague Peace Conference, speaking for the Imperial German Government, the court would be overwhelmed with business.

28. United States v. State of North Carolina.

(136 U.S. 211) 1890.

Notwithstanding Justice Nott's harsh statement that the United States, of nearly all governments, is the 'least amenable to the law', it is gratifying to note that, since the year 1870, in which the learned Justice broke a lance for judicial settlement, the United States has mended its ways. It not only continues to allow itself to be sued, but it has appeared more than once as plaintiff in the Supreme Court of the United States against more than one of the United States. If the appetite grows by what it feeds on, as the maxim says it does, Mr. Justice Nott would be able, in a few years, to hold up his government not as a warning but as a model to others in the matter of judicial settlement.

First case of suit by the United States against a State.

The case of the *United States* v. *North Carolina* (136 U.S. 211), decided by the Supreme Court in 1890, is the first of a series in which the United States appeared in the Court of the States as a party litigant against one of them. The entire statement of the case, taken from the opinion of Mr. Justice Gray, speaking for the court, is adopted by the reporter as sufficient for the purpose of the professional, and it is therefore amply sufficient for the more restricted purpose of the general reader. Therefore, in the language of the report :

An action of debt upon State bonds.

This was an action of debt, brought in this court, on November 5, 1889, by the United States against the State of North Carolina, upon one hundred and forty-seven bonds under the seal of the State, signed by the Governor, and countersigned by the Public Treasurer, for one thousand dollars each, payable in thirty years from date, with interest at the yearly rate of six per cent, alleged in the declaration to be payable half-yearly until payment of the principal. . . .

The declaration alleged that, at the dates when the bonds became payable, payment of the principal was demanded by the United States and refused by the State of North Carolina.

The State of North Carolina pleaded payment of the principal sums of the bonds after they became payable, together with all interest accrued thereon to the days when they became payable.

The United States moved for judgment, as by *nil dicit*, because the plea did not answer to so much of their demand as was for interest after the bonds became payable.

The case was submitted to the decision of the court upon a case stated, signed by the Attorney General of the United States, and by the Attorney General of North Carolina, as follows :

'The parties to the above-entitled case stipulate that upon the issue joined the facts are that payment of the bonds was demanded and refused at the several times in the years 1884 and 1885 in the declaration alleged ; but subsequently,

upon or about the 2d day of October, 1889, all coupons upon the bonds were paid, and that, besides, $147,000 was paid upon account of whatever might then remain due upon the bonds; the United States then contending that because of interest at six per cent per annum, which at that time had accrued upon the principal of the bonds since their maturity, such payment left still unpaid upon the debt the sum of $41,280; whilst the State then contended that no interest had accrued upon the principal of the bonds after their maturity, and therefore that such principal was in full of such debt.

'The parties submit to the court that, in case as matter of law the principal of said bonds did so bear interest after maturity, judgment is to be entered for the plaintiff for $41,280; but that if it did not so bear interest, judgment is to be entered for the defendant.'[1]

No objection raised to the jurisdiction.

The question of jurisdiction, it will be observed, was waived, in so far as it could be, by the parties, inasmuch as North Carolina joined with the United States in submitting the case to the Court of the States; but the Supreme Court was not unmindful in the premises, and although the question of jurisdiction was not raised, and although it is not mentioned in the opinion of the Court, it was nevertheless considered by the judges, as appears from the following statement of Mr. Justice Harlan, who, in the case of *United States* v. *Texas* (143 U.S. 621, 642), decided in 1892, said:

It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State.

The judges, therefore, had apparently debated the matter, although the question was not raised, remembering that there were no ordinary suitors before the court, and that the court, in justice to them as well as to itself and to the cause of judicial settlement, dared not take jurisdiction unless to do so were a duty cast upon them by the Constitution.

But further observations upon this phase of the question would be out of place, as the question of jurisdiction was raised and elaborately considered in the case of *United States* v. *Texas*, presently to be considered. The only question—and it moved within narrow compass—in the case of *United States* v. *North Carolina* was by agreement of the parties whether interest was due and payable after the maturity of the bonds. It being admitted by the plaintiff and defendant that interest was payable upon the coupons until the maturity of the bonds, or, as Mr. Justice Gray put it, 'the only question presented for our decision is whether, as a matter of law, the principal of the bonds bore interest after maturity, and according to our opinion upon this question, judgment is to be entered for the one party or the other'.[2]

Is interest due on State bonds after maturity?

If the law binding individuals should apply to the State without modification, the question could not be considered doubtful, but in public law the interests of States are more tenderly treated, and a procedure proper as between private persons is tested in order to see if it should apply in all its rigour to public persons, which we call States in the United States and Nations in the society of nations. It seems

[1] *United States* v. *State of North Carolina* (136 U.S. 211, 212–15).
[2] *Ibid.* (136 U.S. 211, 216).

to be agreed that, just as private persons pay interest, if they do not stipulate to the contrary, public persons do not pay interest unless they bind themselves to do so. And the reason for the distinction seems to be one of real or imaginary convenience to the public. Thus, Justice Gray says :

Unlike private persons,

Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled ; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U.S. 565 ; *Angarica* v. *Bayard*, 127 U.S. 251, 260, and authorities there collected ; *In re Gosman*, 17 Ch. D. 771.[1]

States are not liable for interest except by express agreement.

After examining these three cases, which he considered the leading ones on the subject, and some others, not so leading but to the same effect, the learned Justice reviewed the leading cases of North Carolina on the subject, and was able to say that ' it is equally well settled, by judgments of the Supreme Court of North Carolina, that the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid '.[2] The law, therefore, of three jurisdictions, of Great Britain, the United States, and of North Carolina was to one effect and was counter to the claim of the United States.

Mr. Justice Gray thereupon examined the law of North Carolina, by virtue of which the bonds were issued, and the bonds themselves, in order to see if there were a promise to pay interest after maturity, so as to take the case out of the general rule. He found no evidence of consent to pay interest after maturity in the laws of the State by virtue of which the bonds were issued, or in the bonds themselves. The contention of the United States in the matter of interest failed unless it could be sustained that the bonds were to bear interest after maturity, because made payable in New York, according to the laws of which State, it seems, interest is payable upon bonds after maturity. Mr. Justice Gray, however, made short shrift of this contention of the United States, saying :

that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they are made, unless the contracting parties appear to have had some other place in view. *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U.S. 397, 453.[3]

The mere stipulation that the bonds were to be paid in New York did not of itself vary the law of North Carolina, in which State they were issued, and by the law of which State they did not bear interest after maturity. The court, therefore, decided against the United States, although Mr. Justice Miller, Mr. Justice Field, and Mr. Justice Harlan dissented, and sustained the plea of North Carolina that interest did not run after the maturity of the bonds, inasmuch as there was no contract to that effect or consent on the part of North Carolina to have the bonds pay interest after their maturity.

Decision of majority of the Court against the United States.

It is interesting to note that, in this case, not the first, indeed, in which the United States appeared at the bar of the court in a proceeding between States, for it had intervened in the case of *Florida* v. *Georgia* (17 Howard, 478), but the

[1] *United States* v. *State of North Carolina* (136 U.S. 211, 216).
[2] *Ibid.* (136 U.S. 211, 218–19).
[3] *Ibid.* (136 U.S. 211, 222).

first in which it appeared on the record as party plaintiff, the judgement of the court should be adverse to its claims, and that it should leave the forum of its choice a defeated litigant, which is bound to be the fate of one or other litigant, however high or however low, in a court of justice.

29. State of Indiana v. State of Kentucky.

(136 U.S. 479) 1890.

A boundary dispute.

The case of *Indiana* v. *Kentucky* (136 U.S. 479), decided by the Supreme Court in 1890 in favour of the latter State, was a controversy as to the boundary between the two States, separated by the Ohio River; but the northern boundary line of Kentucky, wherever drawn, is the southern boundary line of Indiana, for the two States are contiguous to this extent.

The case is one in which history plays an important, indeed a dominating rôle, as so often happens in boundary disputes between nations as well as states, and because of this it seems advisable to draw upon history before stating the particular facts and circumstances which gave rise to the particular controversy under consideration.

History of the boundaries.

It is common knowledge that the Commonwealth of Virginia claimed under its charter vast tracts of territory to the west and north-west of its present boundaries. If it is appropriately called the mother of presidents it can with equal propriety be called the mother of states of vast and imperial extent, because numerous states of the American Union have been formed out of this territory claimed by Virginia, including Kentucky and Indiana among others, and ceded by it to the United States at the conclusion of the war of the Revolution. On December 20, 1783, the legislature of Virginia authorized and empowered its delegates in the Congress of the United States, ' for and on behalf of this State, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign, and make over unto the United States, in Congress assembled, for the benefit of the said States, all right, title and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the north-west of the river Ohio '.[1] In the exercise of this authorization and of this power, the delegates from that State in Congress executed and delivered, on the first day of March, 1784, ' to the United States in Congress assembled ' a deed of ' all right, title, and claim, as well of soil as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the north-west of the river Ohio '. The deed was on the same day accepted by the Congress and was spread at length upon its records.[2]

It may be proper to mention, in this connexion, that this act of Virginia was of immediate as well as of future interest, inasmuch as the claims of Virginia to the west and north-west had prevented Maryland from ratifying the Articles of Confederation. This action on the part of Virginia removed the opposition of this State, and it thereupon ratified the Articles of Confederation, forming of the states a confederation, shortly thereafter, upon the initiative of the great Commonwealth, to be formed into that more perfect Union under the Constitution.

[1] *State of Indiana* v. *State of Kentucky* (136 U.S. 479). [2] *Ibid.* (136 U.S. 479).

Under the Confederation the Congress thereof passed a very important statute on July 13, 1787, entitled, 'An ordinance for the government of the territory of the United States north-west of the river Ohio.' A year later, in order to remove any doubt or misunderstanding that there might be regarding the nature and extent of the deed of cession of 1784 made by Virginia of the territory to the west and north-west to the United States, the legislature of Virginia in 1788 passed a statute reciting the ordinance, and which provided 'that the afore-recited article of compact between the original States and the people and States in the territory north-west of Ohio river be, and the same is hereby, ratified and confirmed, anything to the contrary in the deed of cession of the said territory by this Commonwealth to the United States notwithstanding.'[1]

On August 7, 1789, the first Congress under the Constitution passed an act 'to provide for the government of the territory northwest of the river Ohio', and on December 18th of that year the legislature of Virginia consented by statute 'that the district of Kentucky, within the jurisdiction of said Commonwealth, and according to its actual boundaries at that time, should be formed into a new State'. The act further provided that 'the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth, lies therein, shall be free and common to the citizens of the United States; and the respective jurisdictions of this Commonwealth and of the proposed State, on the river aforesaid, shall be concurrent only with the States which shall possess the opposite shores of the said river.'[2] On May 26, 1790, Congress created a territorial government for 'the territory of the United States south of the river Ohio,' and on February 4, 1791, consented to the admission of Kentucky into the Union 'according to its actual boundaries on the 18th day of December, 1789;' that is to say, the date of the statute of Virginia consenting to the admission of the district of Kentucky as a State of the American Union. On May 7, 1800, an act was passed by Congress 'to divide the territory of the United States northwest of the Ohio into two separate governments', and on April 30, 1802, an enabling act for the admission of Ohio was passed, the river of that name being made the southern boundary. By this act the territory to the west of the present boundary of Ohio and east of the division line established by the act of 1800 was 'made a part of the Indiana territory'. On February 3, 1809, the territory of Illinois was separated from the territory of Indiana, the Wabash River forming the boundary between the two territories, and on April 19, 1816, an act of Congress was passed enabling Indiana to become a State, in which it was enacted that it should be bounded 'on the south by the river Ohio, from the mouth of the Great Miami River to the mouth of the river Wabash'.[3]

In these dry and uninteresting enactments we have the genesis of the State of Indiana, bounded on the east by Ohio, on the west by Illinois, and on the south by that portion of the river Ohio between the Miami and the Wabash. In all these enactments it is to be observed that the territories formed out of the territory conveyed by Virginia are bounded on the south by the river Ohio, the navigation of which is to be free to the citizens of the United States and the jurisdiction 'concurrent

[1] *State of Indiana* v. *State of Kentucky* (136 U.S. 479, 480).
[2] *Ibid.* (136 U.S. 479, 480).
[3] *Ibid.* (136 U.S. 479, 480–1).

only with the States which shall possess the opposite shores of the said river'. These States did not, therefore, extend to the centre of the stream but only to the stream.

Chief Justice Marshall on the boundary question, 1820.

We do not need to speculate as to where the line between the state of Indiana on the north and of Kentucky on the south should be drawn, as Mr. Chief Justice Marshall, speaking for a unanimous court in the case of *Handly's Lessee* v. *Anthony* (5 Wheaton 374), decided in 1820, within four years after the act had been passed enabling Indiana to become a state, decided that Kentucky extended to the low-water mark on the western or north-western side of the Ohio River. The suit was not between the States but involved their jurisdiction over territory, inasmuch as the plaintiff in the action claimed a grant of a strip of land from the State of Kentucky, whereas the defendants held under a grant from the United States as being part of Indiana. Under these circumstances the Chief Justice said:

> The title depends upon the question whether the lands lie in the State of Kentucky or in the State of Indiana.

In a portion of his opinion, Chief Justice Marshall calls attention to the fact that, in making the Ohio River the boundary, Virginia must have meant not merely a narrow bayou, into which its waters occasionally run, but the great river itself; and after stating the arguments of contending counsel, he proceeded to lay down the rule to be followed in this class of cases:

Principle of law governing river boundaries.

> The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one State or the other.
>
> There would be little difficulty in deciding, that in any case other than land which was sometimes an island, the state of Indiana would extend to low water mark. Is there any safe and secure principle, on which we can apply a different rule to land which is sometimes, though not always, surrounded by water?
>
> So far as respects the great purposes for which the river was taken as the boundary, the two cases seem to be within the same reason, and to require the same rule. It would be as inconvenient to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last-mentioned State, as it would for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the State on the opposite shore. Neither the one nor the other can be considered as intended by the deed of cession.
>
> If a river, subject to tides, constituted the boundary of a State, and at flood the waters of the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country; this portion of territory would scarcely be considered as belonging to the State on the opposite side of the river, although that State should have the property of the river. The principle that a country bounded by a river extends to low water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason why it should not apply to this.
>
> The case is certainly not without its difficulties; but in great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. The State of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia, which is now Kentucky, became a separate

State, the river was the boundary between the new States erected by congress in the ceded territory, and Kentucky. Those principles and considerations which produced the boundary, ought to preserve it. They seem to us to require, that Kentucky should not pass the main river, and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel.[1]

In view of the case of *Handly's Lessee* v. *Anthony*, and the principle laid down by the great Chief Justice, it is evident that the controversy could only be as to the possession of land to the north of the river and that any attempt on the part of Kentucky to invade the jurisdiction of Indiana would be stopped by the strong hand of the law, just as any attempt on the part of Indiana to extend itself beyond low-water mark would be met and held in check by the river itself. The land in question was Green River Island, ' a formation in the river on the Indiana side, opposite the mouth of the Green River entering the Ohio from Kentucky.' The nature and extent of the controversy, which the two States had been unable to settle amicably without the intervention of the Supreme Court, are thus stated by Mr. Justice Field in delivering its unanimous opinion :

Opinion of the Court.

This is a controversy between the State of Indiana and the State of Kentucky growing out of their respective claims to the possession of and jurisdiction over a tract of land nearly five miles in length and over half a mile in width, embracing about two thousand acres, lying on what is now the north side of the Ohio River.

Kentucky alleges that when she became a State on the 1st of June, 1792, this tract was an island in the Ohio River, and was thus within her boundaries, which had been prescribed by the act of Virginia creating the District of Kentucky. The territory assigned to her was bounded on the north by the territory ceded by Virginia to the United States. The tract in controversy was then and has ever since been called Green River Island. Kentucky founds her claim to its possession and to jurisdiction over it upon the alleged ground that at that time the river Ohio ran north of it, and her boundaries extended to low-water mark on the north side of the river ; also upon her long undisturbed possession of the premises, and the recognition of her rights by the legislation of Indiana.

Indiana rests her claim also upon the boundaries assigned to her when she was admitted into the Union on the 11th of December, 1816, of which the southern line was designated 'as the river Ohio from the mouth of the Great Miami River to the mouth of the Wabash'. This boundary, as she alleges, embraces the island in question, she contending that the river then ran south of it, and that a mere bayou separated it from the mainland on the north.[2]

The learned Justice then examined the various statutes dealing with the cession up to and including the boundaries of the State of Indiana contained in the enabling act of 1816. In addition, he called attention to an act of the General Assembly of Kentucky, passed in 1810, six years before the admission of the State of Indiana, the material portion of which act, passed to remove doubts as to the jurisdiction of Kentucky, is thus worded :

That each county of this Commonwealth, calling for the river Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the respective counties holding the main land opposite thereto, within this State, and the several county tribunals shall hold jurisdiction accordingly.[3]

[1] *Handly's Lessee* v. *Anthony* (5 Wheaton, 374, 382–4).
[2] *State of Indiana* v. *State of Kentucky* (136 U.S. 479, 503).
[3] *Ibid.* (136 U.S. 479, 505).

He next invokes the great authority of Chief Justice Marshall in the case of *Handly's Lessee* v. *Anthony* (5 Wheaton, 374, 379), already referred to, and thus comments upon the early statutes dealing with this question and the language of Chief Justice Marshall :

We agree with the observations of the court in *Handly's Lessee* v. *Anthony*, that great inconvenience would have followed if land on either side of the river, that was separated from the mainland only by a mere bayou, which did not appear to have ever been navigable, and was dry a portion of the year, had been attached to the jurisdiction of the State on the opposite side of the river ; and, in the absence of proof that the waters of the river once flowed between the tract in controversy in this case, and the mainland of Indiana, we should feel compelled to hold that it was properly within the jurisdiction of the latter State. But the question here is not, as if the point were raised to-day for the first time, to what State the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State, separated from the mainland of Indiana by the waters of the Ohio River. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two States. That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress. If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to the low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri* v. *Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.[1]

State boundaries cannot be altered by the action of natural forces.

This practically settles the case and makes it turn upon the evidence introduced by the litigating parties to determine the channel of the Ohio River in 1792. As a result of the examination of the evidence as to the channel, Mr. Justice Field concluded :

Original course of the river.

It is clear, we think, from the whole testimony, that at an early day after Kentucky became a State, the channel between the island and the mainland of Indiana was often filled with water the whole year and sometimes to the width of two hundred yards ; and that water passed through it, of more or less depth, the greater part of the year, until down to a period subsequent to the admission of Indiana into the Union.[2]

It was evident, therefore, that, at the time of the conveyance of its western domain by Virginia to the United States, the Ohio River flowed to the north of Green River Island ; that it likewise flowed to the north of the island in 1792 when Kentucky became a State with its present boundaries, and also in 1816, when Indiana became a State, likewise with its present boundaries. The change in the channel, therefore, as

[1] *State of Indiana* v. *State of Kentucky* (136 U.S. 479, 507–8).
[2] *Ibid.* (136 U.S. 479, 509).

stated by the learned Justice, would not affect the line between the States, inasmuch as, once fixed, it did not depend upon the presence of water to preserve it.

Long possession by Kentucky.

In the next place, the court laid great stress upon the view that for seventy years after its admission to the Union as a State, Indiana never asserted any claim by legal proceedings to the tract in question ; but, on the contrary, Indiana admitted that, during all these years, Kentucky claimed and exercised jurisdiction over it. On this phase of the question the learned Justice referred to the decision of the court in the case of *Rhode Island* v. *Massachusetts* (4 Howard, 591, 639), and he quoted with approval a passage from Vattel's *Law of Nations* as establishing prescription between States and Nations as well as individuals. It would perhaps be sufficient to dismiss this matter with a reference to the case and to the authority, but inasmuch as the doctrine of prescription, so important to nations, has been questioned as applying to them, it seems well to lay before the reader the holding of the Supreme Court and the views of a great and not the least of the founders of international law. First, as to the case :

The principle of acquiescence in possession.

This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of *Rhode Island* v. *Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said : ' Surely this, connected with the lapse of time, must remove all doubts as to the rights of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.' [1]

Next, as to the statement of the Swiss publicist :

Vattel and Wheaton cited.

Vattel, in his Law of Nations, speaking on the same subject, says : ' The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire and other rights of nations, should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.' Book II, c. 11, § 149.[2]

And the learned Justice confirms the theory of Vattel, if confirmation is needed, by the following passage from the American publicist Wheaton, taken from his *International Law* :

The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation ; but the constant and approved practice

[1] *State of Indiana* v. *State of Kentucky* (136 U.S. 479, 510–11).
[2] *Ibid.* (136 U.S. 479, 511).

of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. Part II, c. IV, § 164.[1]

The federal survey of 1805–6.

The court, however, was unwilling to rest its judgement upon the acquiescence or inaction of the State of Indiana, and it appealed to no mean authority when it invoked the survey of 1805 and 1806, authorized by Congress, which 'did not include', to quote the language of the Court, 'the island within the territory north of the Ohio, but treated the bank of the bayou or channel north of the island as the bank of that river;'[2] and the court felt itself justified in saying, as the result of its examination of the question, that 'This survey, from the time it was made, has been regarded as establishing the fact that the southern boundary of Indiana lies north of the island'.[3] The learned Justice further refers not merely to an act of Indiana, but to what may be called a joint act of both of the States, which tended to confirm the court in the opinion which it had already reached. In 1875 the legislature of Indiana passed an act 'to ascertain the location of the boundary line between the States of Indiana and Kentucky above and near Evansville, and making the same evidence in any dispute'.[4] This action of Indiana was in response to a similar action taken two years previously by the State of Kentucky, authorizing the Governor of that State to appoint a surveyor to act with a like person appointed by the Governor of Indiana, to make a survey of the land in controversy.[5] In 1877 the commissioners made a survey, and, to quote the language of the court, 'ran a line on the north side of Green River Island, and also of the small tract known as Buck Island. In doing this, they followed the lines of the United States survey of 1806. By this survey both these islands were left within the State of Kentucky.'[6] Great dissatisfaction, however, was expressed by the people in the vicinage. Although the act as passed authorized the commissioners to run a line and made the survey of the commissioners 'conclusive evidence in any of the courts of this State of the boundary line between the States of Indiana and Kentucky, between the points on said Green River Island, heretofore indicated',[7] the legislature of Indiana, upon the recommendation of the governor, repealed the law, although the repeal of the act could not affect the fact that the commissioners appointed to determine the line had reported against the contentions of Indiana, and no amount of argument could change the fact that the Ohio, running to the south of Green Island, had run to the north of it when the Ohio was made the boundary of the territory which, in 1784, Virginia conveyed to the United States. Great rivers change their courses, and consistency does not seem to be more characteristic of rivers than of those who navigate their waters. The one changes its channel; the other its mind, but the fact remains. In the case of the Ohio changes were to be expected, the court saying:

Erratic nature of the Ohio

Great changes in the bed of the river were to be expected from the immense volume and flow from its vast water-sheds. These water-sheds, according to the official report of the Tenth Census of the United States, cited by counsel, comprise over two hundred thousand square miles, and more than half of the water from them comes

[1] *State of Indiana* v. *State of Kentucky* (136 U.S. 479, 511, 512).
[2] *Ibid.* (136 U.S. 479, 512). [3] *Ibid.* (136 U.S. 479, 512). [4] *Ibid.* (136 U.S. 479, 512).
[5] *Ibid.* (136 U.S. 479, 513). [6] *Ibid.* (136 U.S. 479, 514). [7] *Ibid.* (136 U.S. 479, 513).

from east of Green River Island, and nearly all the great water-courses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks, deepening some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterwards was but the natural effect of the tremendous forces thus brought into operation.[1]

The court therefore concluded its careful and interesting opinion with the following statement and with the following order:

Decision of the Court in favour of Kentucky.

The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it.

Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

Boundary commissioners appointed.

Judgment in favor of the claim of Kentucky will be entered in conformity with this opinion; and commissioners will be appointed to ascertain and run the boundary line as herein designated, and to report to this court, upon which appointment counsel of the parties will be heard on notice. And it is so ordered.[2]

30. State of Nebraska v. State of Iowa.

(143 U.S. 359) 1891.

A boundary dispute

With the exception of the two cases of *Missouri* v. *Iowa*, already discussed, the boundary disputes have been between States to the east of the Mississippi. For the most part the controversies arose out of the charters, necessarily uncertain as to the nature and extent of the territories, which no man had seen and which were granted as water by their proprietors. In a lesser degree the territory to the west of the Mississippi was unfamiliar to the Congress in the days when it created territorial governments for vast and indefinite tracts, and when it carved out for them States with natural objects as boundaries or according to surveys inaccurately made.

due to a sudden change in the Missouri River.

The boundary dispute of *Nebraska* v. *Iowa* (143 U.S. 359), decided in 1891, was of this character, aggravated by a sudden change in the course of the Missouri River. As stated by the reporter, using the language of the court, the case is as follows:

The middle of the channel the State boundary.

This is an original suit brought in this court by the State of Nebraska against the State of Iowa, the object of which is to have the boundary line between the two States determined. Iowa was admitted into the Union in 1846, and its western boundary as defined by the act of admission was the middle of the main channel of the Missouri River. Nebraska was admitted in 1867, and its eastern boundary was likewise the middle of the channel of the Missouri River. Between 1851 and 1877,

[1] *State of Indiana* v. *State of Kentucky* (136 U.S. 479, 518).

[2] *Ibid.* (136 U.S. 479, 518–19). The later phases of this case are discussed in *State of Indiana* v. *State of Kentucky* (159 U.S. 275) (1895) and *State of Indiana* v. *State of Kentucky* (167 U.S. 270) (1896).

in the vicinity of Omaha, there were marked changes in the course of this channel, so that in the latter year it occupied a very different bed from that through which it flowed in the former year. Out of these changes has come this litigation, the respective States claiming jurisdiction over the same tract of land. To the bill filed by the State of Nebraska the State of Iowa answered, alleging that this disputed ground was part of its territory, and also filed a cross-bill, praying affirmative relief, establishing its jurisdiction thereof, to which cross-bill the State of Nebraska answered. Replications were duly filed and proofs taken.[1]

Judgement of the Court.

The opinion of Mr. Justice Brewer, which was the unanimous opinion of the court, is one to gladden the international lawyer, for it teems with references to books of authority in order to lay down the principle that the slow, gradual, and imperceptible change of a river by what is technically called accretion carries the boundary with it, whereas the sudden change of a river, by what is known as avulsion, does not affect the boundary between the States. In this latter case the original bed of the river is discernible, which is not the case in the gradual give and take resulting in the small, or at least imperceptible, gain of one and the equal loss of another of contiguous States in the process of accretion.

Distinction between avulsion and accretion.

Sudden diversion of the Missouri River, 1877.

Finding it to be a fact, established by testimony, 'that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel,'[2] the learned Justice held that such a change fell within the law of avulsion, not that of accretion. Therefore the boundary line between the two States did not follow the vagaries of the Missouri River, but remained, before as after, in the old channel and in the central line thereof, 'and that,' to quote the language of the court, 'unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.'[3] The court therefore decreed and ordered :

Judgement of the Court determining the principle.

We think we have by these observations indicated as clearly as is possible the boundary between the two States, and upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed.

The costs of this suit will be divided between the two States, because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious, interest.[4]

In the opening lines of his opinion Mr. Justice Brewer said :

The law of river boundaries explained.

It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary.[5]

He next shows that :

It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary ; and that the boundary remains as it was, in the centre

[1] *State of Nebraska* v. *State of Iowa* (143 U.S. 359–60).

[2] *Ibid.* (143 U.S. 359, 370).

[3] *Ibid.* (143 U.S. 359, 370).

[4] *Ibid.* (143 U.S. 359, 370). For the second and final phase of this case see *State of Nebraska* v. *State of Iowa* (143 U.S. 519), decided in 1892.

[5] *State of Nebraska* v. *State of Iowa* (143 U.S. 359, 360).

of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion.[1]

A question of international law.

In support of this statement of the law the learned Justice cited adjudged cases of national courts. His purpose, however, was to show that these principles applied to States and to Nations as well as to individuals, because international law is a part of the law of the land and international law is administered between States when its principles properly apply to their disputes. To make it clear, therefore, that the domestic law was the same as the law of nations, he invoked in first instance the very great authority of Mr. Caleb Cushing, Attorney-General of the United States, and whose opinions as adviser to the Government are models of sound learning and of classical expression. Thus he says, speaking of changes in the course of the Rio Grande :

Mr. Cushing's opinion in the dispute with Mexico.

With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary.[2]

For the many authorities on international law, quoted by Mr. Justice Brewer from the opinion of Attorney-General Cushing, space is not to be spared ; but one writer, whose testimony cannot be denied nor his authority gainsaid, should be quoted, and cannot be too often quoted at a time when it is especially necessary to show that the conduct of nations has been, must be, and therefore will be conducted according to the law of nations. Thus the Swiss Publicist, whom Mr. Justice Brewer quotes in English, and because of the importance of his language adds the original in the margin, says in his *Law of Nations*, published for the first time in 1758 and repeatedly reissued :

Vattel cited.

Vattel states the rule thus (Book I, c. 22, secs. 268, 269, 270) :

'If a territory which terminates on a river has no other boundary than that river, it is one of those territories that have natural or indeterminate bounds (*territoria arcifinia*), and it enjoys the right of alluvion ; that is to say, every gradual increase of soil, every addition which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side—or if it is given to

[1] *State of Nebraska* v. *State of Iowa* (143 U.S. 359, 361). [2] *Ibid.* (143 U.S. 359, 361–2).

me upon that footing, I thus acquired beforehand the right of alluvion ; and, consequently, I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say " insensibly ", because, in the very uncommon case called alluvion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. The civil laws have thus provided against and decided this case, when it happens between individual and individual ; they ought to unite equity with the welfare of the state, and the care of preventing litigations.

' In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself ; because nothing is more natural than to take a river for a boundary, when a settlement is made ; and wherever there is a doubt, that is always to be presumed which is most natural and most probable.

' As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants on each of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights, with respect to the river are in no wise changed by the alluvion. If, therefore, it happens that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and, notwithstanding the progressive changes in its course, each retains over it the same rights which it possessed before ; so that, if, for instance, it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other gains ; but nature alone produces this change ; she destroys the land of the one while she forms new land for the other. The case cannot be otherwise determined, since they have taken the river alone for their limits.

' But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into one of the two neighboring States, the bed which it has abandoned becomes thenceforward their boundary, and remains the property of the former owner of the river, (sec. 267,) the river itself is, as it were, annihilated in all that part while it is reproduced in its new bed, and there belongs only to the State in which it flows.'[1]

So much for the law ; now, as to the river, which Mr. Justice Brewer describes as an eye-witness, and, understanding its peculiarities, holds that the doctrine of accretion applies to it under ordinary conditions :

Character of the Missouri River.

The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. In building the bridge of the Union Pacific Railway Company across the Missouri River, in the vicinity of the tracts in controversy, the builders went down to the solid rock, sixty-five feet below the surface and there found a pine log a foot and a half in diameter—of course, a deposit made in the long ago. The current is rapid, far above the average of ordinary rivers ; and by reason of the snows in the mountains there are two well-known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil upon the river ; so that it may,

[1] *State of Nebraska* v. *State of Iowa* (143 U.S. 359, 364–7).

in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri River, and disclosed by the testimony: that, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles borne onward by the flowing water and giving to the stream that color which, in the history of the country, has made it known as the 'muddy' Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such solid body of earth to the opposite shore or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principles underlying the rule of law in respect thereto.

Having thus clearly stated that the process of accretion is to be recognized as operating in the Missouri, although the suddenness of the change may suggest avulsion in one of its phases, the learned Justice draws the necessary consequences from his own observations and the testimony of others:

Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.[1]

31. United States v. State of Texas.

(143 U.S. 621) 1892.

The case of the *United States* v. *Texas* (143 U.S. 621), decided in 1892, is of extraordinary interest, as it discloses the United States, about whose sovereignty no American and no foreigner would raise a question, summoning to the bar of the Supreme Court the State of Texas, once a member of the society of nations, which no professor of political science could maintain had not once been a sovereign state, as some professors of political science are wont to assert that the colonies became, on the Declaration of Independence, states of the Union without ever having been States of international law. The State of Texas had no antecedent connexion with the United States, but the Congress consented by joint resolution of March 1,

Texas, formerly an independent republic,

[1] *State of Nebraska* v. *State of Iowa* (143 U.S. 359, 368–70).

admitted to the Union in 1845.

1845, to its admission upon certain conditions, and upon the acceptance thereof, the Republic of Texas was by a joint resolution of Congress of December 29, 1845, admitted to the Greater Republic of American States upon a footing of equality, with the same rights, the same duties, the same privileges as any other State of this Union of States. The State had formed a part of Mexico, itself an off-shoot of Spain, and there are no charters of English-speaking kings or proprietors to measure its ample boundaries. It declared its independence of Mexico in 1836, and set out for itself as a republic, recognized as such by the United States and by the powers of Europe, although the youthful Mexico, in the rather embarrassing rôle of a mother country, was not very prompt in the matter of recognition.

The Mexican War.

The boundary claimed by Texas and supported by the United States extended as far west as the Rio Grande, whereas the contention of Mexico would have made of the Neuces River, many miles to the east, the frontier between the Republic of Texas and the Republic of Mexico. The contention of the United States, as the contention of the stronger, prevailed by force of arms. The controversy between Texas and the United States did not relate to the western boundary, and was fortunately prosecuted in a forum where arms and physical strength do not count.

There are two cases in the reports of the Supreme Court under the caption of *United States* v. *Texas*, the first of which deals with the question of jurisdiction, inasmuch as the State of Texas contested the right of the Supreme Court to entertain and to decide the dispute, on the ground, among others, that it was of a political nature ; and the second of which decides the dispute after the decision of the court that it could properly take jurisdiction of the question. In view, therefore, of this twofold division, it is advisable to eliminate from the first case, and to remit to the second questions of boundary naturally considered and decided in the second, and to examine the matter of jurisdiction with only such reference to the facts of the case as are strictly necessary for the comprehension of this phase of it.

Dispute about the Oklahoma boundary.

It is sufficient for present purposes to state that the United States, by act of Congress of May 2, 1890, provided a temporary government for the Territory of Oklahoma, and as a large portion of the land which it claimed and wished to include within the boundaries of the new territory was claimed by Texas and included within its domain as Greer County, the Congress authorized and directed the Attorney-General to file a bill in equity in the Supreme Court in behalf of the United States, in order to have the ownership of the territory in question judicially determined. In the meantime, the land in dispute was exempted from the operation of the act. The State of Texas answered the bill of the United States, denying its right to the land in controversy and setting up its own claim to it. At the same time Texas filed a demurrer, maintaining in the first place that the question was political, not judicial ; in the second place, that if it were judicial, the United States should not prosecute in its own court a claim to which the United States and Texas were both parties and had an equal right to an impartial hearing ; and finally, that the remedy of the United States was at law, not in equity, as the title to realty could be ascertained in a suit at law, whereas it could not be ascertained in a suit in equity, for which reason the act of Congress declaring that a suit of law should be a suit in equity, and that legal rights should be determined in equity instead of in a court of law, was unconstitutional and void.

Texas demurs to the jurisdiction.

Without entering into the facts, or the treaties and conventions on which they are based, it may perhaps be added in this connexion that the tract of land in dispute amounted to 1,511,576.17 acres, and that the possession thereof turned upon the point from which the boundary should be drawn westward. If from the South fork of the Red River the territory in question admittedly became the property of Texas. It may further be said that the documents were obscure, if not ambiguous, so that an honest difference of opinion, uncoloured by interest in the possession of the property, might well have existed.

In the course of a very careful and close-knit argument, counsel for Texas objected, and sought to sustain their objections, to the jurisdiction of the Supreme Court in the dispute, and they properly made this the preliminary question and dwelt upon it with insistence, because, if the Supreme Court could not entertain the suit, the case of the United States failed upon the very threshold. The first point, which only need be stated without elaborating upon it, was that a State could not be sued without its consent, that Texas had never given its consent to this suit, and that consent to be sued could not be presumed from the clause of the Constitution vesting the Supreme Court with original jurisdiction in cases to which States were parties, inasmuch as the judicial power of the United States did not extend to a suit by the United States against one of them. Therefore the consent of Texas to be sued applied merely to a suit by a sister state, not to a suit by the United States, for which the express consent of Texas would be required, supposing that the suit was of a kind whereof the court could take jurisdiction, that is to say, that it was justiciable. But, in the opinion of counsel for Texas, the suit was not justiciable.

Claim that Texas had not consented to suit.

In view of repeated decisions of the Supreme Court in boundary disputes, counsel were indeed bold to maintain that the suit was political, not judicial, for, while a boundary dispute between independent nations is political, counsel should have recalled the statement of Mr. Justice Baldwin, concurred in by the court, whose opinion he delivered, that a reference of a political question to a court of justice made that judicial which was political before. Counsel were familiar with the case of *Rhode Island* v. *Massachusetts* (12 Peters, 657), inasmuch as they cited it. They were, however, unwilling to join issue on this question, inasmuch as they insisted that, should the court be of a contrary opinion, it should nevertheless refrain from assuming jurisdiction, because the judicial power of the United States, and especially the original jurisdiction of the court, did 'not extend to controversies between the United States and individual States'.

Counsel for Texas stood on firm ground—in the sense that the court had not expressly decided the point against them—when they maintained that the United States is not a State within the meaning of the Constitution, and, because of that fact, it had no right to sue ; and even if it could have a right, Texas had not consented to be sued by it. Counsel for Texas dwelt upon the letter, and from examination of the clauses of the Constitution concerning the judicial power, sought to discover its spirit as well. To understand their argument it is necessary to quote rather freely their language. Thus :

Arguments from the Constitution.

As to the contention embodied in the second ground of demurrer, the Constitution provides that the judicial power shall extend to Controversies to which the ' United States shall be a Party ' ; to 'Controversies between two or more States ' ; ' between

a State and citizens of another State ', and ' between a State or the Citizens thereof, and foreign States, citizens or subjects '. The Supreme Court, by the clause immediately following, is given original jurisdiction only in 'cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party '.[1]

They quoted and analysed the section of the Constitution concerning judicial power, and as the result of this examination and analysis they felt justified in saying that:

It is to be noticed that wherever a State is mentioned in the clause declaring the extent of the judicial power, the opposite party to the controversy is also mentioned and in no instance does it include the United States. In other words, the parties with whom the separate States can have legal controversies cognizable in the courts of the United States by reason of the parties thereto, are distinctly named and all others are necessarily excluded. Keeping in view the Eleventh Amendment, it has been justly said, so far as the present question is concerned, that the controversies over which the United States courts are given jurisdiction are 'those to which the United States might be a party; those to which a State of the Union might be a party, *where the opposite party was another State of the Union*'. 2 Curtis Hist. Const. 444.[2]

Continuing this phase of the subject, and still further analysing the language of the Constitution, in the hope that the 'spirit' might get the better of the 'letter', counsel called attention in the next step of their argument to the arrangement by subjects and parties, as in the preceding stage they had dwelt upon the parties. Thus, they said:

The clause establishing the judicial power is arranged by subjects and parties, carefully and accurately grouped, and the cases in which the United States shall be a party are distinctly separated from those in which a State may be. The cases of which this court has original jurisdiction are defined alone by reference to the parties and only two classes of cases are included, namely: those affecting ambassadors, other public ministers and consuls, and those in which a State, in cases over which the judicial power is by the preceding clause extended, shall be a party. In all the other cases mentioned the jurisdiction is declared to be appellate.[3]

From these premises they deduce the conclusion that ' the judicial power does not extend to controversies between the United States and an individual State, nor is the Supreme Court given original jurisdiction in such cases '.[4]

Earlier opinions cited.

Counsel conclude this portion of their argument with a brief quotation from the dissenting opinion of Mr. Justice Campbell in the case of *Florida* v. *Georgia* (17 Howard, 521), and a much longer and a much more persuasive passage from the dissenting opinion of Mr. Justice Curtis in the same case. The statement from Mr. Justice Campbell, in which counsel for Texas found comfort, is very brief, very positive, and to the point. Thus, he said:

There were before the federal convention propositions to extend the judicial powers to questions ' which involve the national peace and harmony '; ' to controversies between the United States and an individual State '; and in the modified form, ' to examine into and decide upon the claims of the United States and an individual state to territory.' None were incorporated into the constitution, and the last was peremptorily rejected.[5]

[1] *United States* v. *State of Texas* (143 U.S. 621, 626).
[2] *Ibid.* (143 U.S. 621, 626). [3] *Ibid.* (143 U.S. 621, 626). [4] *Ibid.* (143 U.S. 621, 627).
[5] *State of Florida* v. *State of Georgia* (17 Howard, 478, 521).

The passage from the dissenting opinion of Mr. Justice Curtis is much longer and argumentative. It is interesting in itself, and is quotable as the deliberate opinion of a learned judge and a keen lawyer, whose opinions are always entitled to respect. It was the dissenting opinion, it was not the opinion of the court, but as counsel for Texas make it their own by quoting it and rest their case upon it, it is fair alike to counsel and to reader, and in the interest of the case itself, to quote the following passage which counsel themselves quoted :

In distributing this jurisdiction, the Constitution has provided that, in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

' I am not aware that any doubt has ever been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day . . .

' We have, then, two rules given by the constitution. The one, that if a State be a party, this court shall have original jurisdiction ; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other would prohibit us from taking jurisdiction.

' It is not to be admitted that there is any real conflict between these clauses of the Constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

' And when it says : " In all cases in which a State shall be a party, the supreme court shall have original jurisdiction," it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

' So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

' It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

' But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the constitution pledges the power of the nation to guarantee to every State a republican form of government ; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This

conservative duty of the whole towards each of its parts, forms no exception to the general proposition, that the Constitution confers on the United States powers to govern the people, and not the States.

'There is, therefore, nothing in the general plan of the Constitution, or in the nature and objects of the powers it confers, or in the relations between the general and State governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States.' [1]

The argument of counsel is not so full on the other points set forth in the demurrer, and indeed it does not seem to be necessary to consider them, because the great point upon which this phase of the case turns was whether the Supreme Court could take jurisdiction of a suit by the United States against one of them, and if this contention was sustained the case fell. If it were not sustained counsel for Texas could not reasonably expect the court to refuse to entertain and to decide the case if it assumed jurisdiction merely because the remedy might be at law, any more than counsel could hope that this court would consider the question political if it was otherwise inclined to entertain jurisdiction in view of the repeated decisions of the court in suits between States determining title to realty upon bill in equity, and the rejection of the contention, wherever made, that the dispute between States concerning boundary retained its political character upon submission to the court.

It was the good fortune of Mr. Justice Harlan to deliver the opinion of the court in both phases of the case of the *United States* v. *Texas*, and because of this fact, as well as for reasons previously alleged, only that portion of his opinion dealing with the question of jurisdiction will be considered in connexion with the first, relegating his views on the boundary dispute as such to the second of the cases. After an analysis of the pleadings and of the treaties upon which the parties based their claims, Mr. Justice Harlan enters upon the question of jurisdiction with a statement which may well serve as a model for the society of nations, when a court of the nations shall be established, should the society appear before this court as a plaintiff in pursuance of the convention creating the court, defining the nature and extent of its judicial power, and authorizing the society so to appear.

Decision of the Court affirming jurisdiction.

'The relief asked', Mr. Justice Harlan says, 'is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called 'Greer County' is within the boundary and jurisdiction of the United States or of the State of Texas. The Government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require'. The learned Justice, without adverting in this place to the contention that Texas did not give its special consent to be sued—because this consent is found by the court to have been given generally in the clause of the Constitution—takes up the contention of counsel for the State of Texas that 'the ascertainment of the boundary between a Territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination'. Mr. Justice Harlan examines the cases cited by counsel (*Foster* v. *Neilson*, 2 Peters, 253; *Cherokee Nation* v. *Georgia*, 5 Peters, 1; *United States* v. *Arredondo*, 6 Peters, 691; and *Garcia* v. *Lee*, 12 Peters, 511), holding that, as between nations, the determination of a boundary is a political question, and

Precedents examined.

[1] *State of Florida* v. *State of Georgia* (17 Howard, 478, 504–6).

shows that, in the American conception, boundary disputes between the colonies and between the states were judicial questions, confirming indirectly the statement of Mr. Justice Baldwin and the holding of the court in *Rhode Island* v. *Massachusetts* (12 Peters, 657), that questions of a political character between nations lose that character and become judicial upon an agreement to submit them to a court. Thus:

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the General Government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made 'the last resort on appeal in all disputes and differences' then subsisting or which thereafter might arise 'between two or more States concerning boundary, jurisdiction or any other cause whatever'; the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art. 9. At the time of the adoption of the Constitution there existed, as this court said in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court. The cases of *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *New Jersey* v. *New York*, 5 Pet. 284, 290; *Missouri* v. *Iowa*, 7 How. 660; *Florida* v. *Georgia*, 17 How. 478; *Alabama* v. *Georgia*, 23 How. 505; *Virginia* v. *West Virginia*, 11 Wall. 39, 55; *Missouri* v. *Kentucky*, 11 Wall. 395; *Indiana* v. *Kentucky*, 136 U.S. 479; and *Nebraska* v. *Iowa*, *ante*, [143 U.S.] 359, were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In *New Jersey* v. *New York*, 5 Pet. 284, 290, Chief Justice Marshall said: 'It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress.' And in *Virginia* v. *West Virginia*, it was said by Mr. Justice Miller to be the established doctrine of this court 'that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding'. So, in *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 287, 288: 'By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. . . . As to "controversies between two or more States". The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees of commissioners appointed by Congress.'[1]

But the rejection of this contention of counsel for the State of Texas was purely negative and preliminary, clearing the way, as it were, of the brush standing in the

[1] *United States* v. *State of Texas* (143 U.S. 621, 639–40).

way of the court; for, although the question was not political, and therefore justiciable, it might nevertheless turn out that the court would not accept jurisdiction of it if the United States, as such, did not possess the right to sue a State in the Supreme Court of the States. This question, standing in the way of the court, had to be removed or overcome if the case was to be decided. Therefore the learned Justice, speaking on behalf of the majority of the court, addressed himself to this phase of the subject, stating fairly the contention of the United States, on the one hand, and of the State of Texas, on the other, and suggesting the reason why jurisdiction should exist under the circumstances:

The only methods outside jurisdiction are (1) agreement, (2) suit in a Texan court, (3) war.

The important question, therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached—and it seems that one is not probable—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas—that State consenting that its courts may be open for the assertion of claims against it by the United States—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: 'It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the state tribunals.' Story Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.[1]

Leaving out, then, consideration of the alternative of an agreement between the United States and Texas, on the one hand, and a suit in the courts of Texas, in which that State consented to be sued by the United States, on the other, the learned Justice addressed himself to the particular objection insisted upon with great earnestness, that the judicial power under the Constitution did not extend to a suit against one of the States by the United States. By way of introduction he calls attention to the fact that the jurisdiction in question had already been exercised in the case of *United States* v. *North Carolina* (136 U.S. 211), with which the reader is already familiar, and states in behalf of the court that, although the question of jurisdiction was not raised by counsel, it was nevertheless considered by the members of the court.

This, however, could not be determinative of the case, because the wrongful exercise of jurisdiction does not create a right of jurisdiction, and it is the law of the land that agreement of the parties litigant cannot enlarge the scope and the power of a court of limited jurisdiction, and appearance of the parties in the suit in pursuance of an illegal agreement does not confer jurisdiction.

[1] *United States* v. *State of Texas* (143 U.S. 621, 641).

As would be naturally expected under the circumstances, Mr. Justice Harlan quotes the clauses of the Constitution relating to the judicial power of the United States, which need not be quoted again in this connexion, and having their exact wording before the reader, as well as in the mind of the court, he thus proceeds to comment upon them and to draw from them their full import and meaning :

Jurisdiction is conferred by the text of the Constitution.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends 'on the character of the cause, whoever may be the parties', and, on the other, on the character of the parties, whatever may be the subject of controversy. *Cohens* v. *Virginia*, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends.[1]

After calling attention to the judiciary act of 1789 to the effect that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party', the learned Justice explained the reason for this restriction, saying:

Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State ? [2]

Continuing his argument, the learned Justice says :

The words, in the Constitution, 'in all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plantiff.[3]

Admitting that the judicial power of the United States, since the 11th amendment, does not extend to suits of individuals against States, as was laid down by the Supreme Court in the case of *Hans* v. *Louisiana* (134 U.S. 1), the learned Justice thus refutes the entire contention of counsel for Texas, which the court found to be unjustified :

It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States 'to *all* cases', in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction 'in *all* cases' in which a State shall be party', that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States.[4]

[1] *United States* v. *State of Texas* (143 U.S. 621, 643).
[2] *Ibid.* (143 U.S. 621, 643). [3] *Ibid.* (143 U.S. 621, 643 4). [4] *Ibid.* (143 U.S. 621, 644).

Having thus defined the categories of suits to which the judicial power of the United States extends, and having found that it extends to suits or controversies in which a State may of right be a party plaintiff or a party defendant, the learned Justice maintains, on behalf of the court, that this case is included within the category, and in measured and impressive language explains the reasons why this is so, and why it must be so, if judicial settlement is to prevail :

The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends ? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State.[1]

Mr. Justice Harlan was aware that disputes as to boundaries between nations were political, and he had so stated in an earlier portion of his opinion, which has been quoted in this narrative. He was likewise aware that, in the system of law from which that of the United States is derived, disputes between the colonies were judicial, and he was both familiar with the admirable statement of Mr. Justice Baldwin, that political disputes became judicial by submission to a court of justice, and the statement of Mr. Justice Bradley, to the effect that the statesmen sitting in conference at Philadelphia had, by the clause which they inserted in the Constitution, made controversies judicial which were not previously so. Indeed, in support of his views he quotes a passage, with which the reader is familiar, but which is very material to the matter in hand, and which, in any event, cannot be too often quoted :

Mr. Justice Bradley, speaking for the court in *Hans* v. *Louisiana*, 134 U.S. 1, 15, referred to what had been said by certain statesmen at the time the Constitution was under submission to the people, and said : 'The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. . . . The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law ; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times ; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U.S. App. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States.'[2]

Abolition of diplomacy between States.

[1] *United States* v. *State of Texas* (143 U.S. 621, 644–5). [2] *Ibid.* (143 U.S. 621, 645).

It would redound to the wisdom of the present generation if, following the example of the statesmen of the American Revolution, they submit disputes between nations to a court of the nations upon the breakdown of diplomacy, for the breakdown is, as we know from the experience of history, synonymous with the extinguishment of diplomacy. But to continue the views of the court, as found in the opinion of Mr. Justice Harlan. The case of *Hans* v. *Louisiana*, from which he quoted, proceeded, as he said ' upon the broad ground that " it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent " '. And, as it seems to us, he very properly drew a distinction between suit by an individual, where consent had not been given, or, if given, was withdrawn by the 11th amendment, and suit by a State, generally as well as expressly given in the clause of the Constitution under consideration. Thus, he says :

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, ' each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, ' in which a State shall be a party,' without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.[1]

Texas has consented to the jurisdiction.

With this statement of the case, the learned Justice announced the opinion of the majority of the court, that, so far as the question of jurisdiction was concerned, the State of Texas could not defeat the suit on the ground that one of the States could not be legally summoned to appear and to litigate a dispute in which the United States appeared as a plaintiff at the bar of the court.

But finally, admitting the jurisdiction of the court, the form of action might stand in the way of the suit, inasmuch as a suitor with a remedy at law would be turned away from a court of equity. The reader would expect that this objection, of a technical nature, would not find favour with the court, where the strict form of procedure in suits between individuals is varied in controversies between states, in order to enable the plaintiff, on the one hand, to open his entire case to the inspection of the court, and the defendant, on the other, to disclose every defence he may possess, to the end that the dispute may be decided upon its merits and equal and

Question of the form of action.

[1] *United States* v. *State of Texas* (143 U.S. 621, 646).

exact justice done between the sovereign litigants. If authority were needed to sustain this view, almost every case of suits between States could be cited, but it is sufficient to recall to the reader's attention the admirable opinion of that great and otherwise technical judge, Mr. Chief Justice Taney, upon whom the mantle of Chief Justice Marshall not unworthily fell, in various phases of *Rhode Island* v. *Massachusetts* (14 Peters, 210; 15 Ibid., 233), and in *Florida* v. *Georgia* (17 Howard, 478).

But the very objection of counsel for Texas against a suit in equity instead of an action in law, in the matter of boundary between States, had been made and met by way of *dictum* in an early case, and expressly by a decree of the court in a later one, and for the convenience of the reader and that questions of this kind may be mentioned in passing without dwelling upon them in future cases, the language of Mr. Justice Harlan, expressing on this point the views of the unanimous court, is given:

It is contended that, even if this court has jurisdiction, the dispute as to boundary must be determined in an action at law, and that the act of Congress requiring the institution of this suit in equity is unconstitutional and void, as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. This is not a new question in this court. It was suggested in argument, though not decided, in *Fowler* v. *Lindsey*, 3 Dall. 411, 413. Mr. Justice Washington, in that case, said: 'I will not say that a State could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The State of New York might, I think, file a bill against the State of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries.' But the question arose directly in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 734, which was a suit in equity in this court involving the boundary line between two States. The court said: 'No court acts differently in deciding on boundary between States, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effect of accident, fraud or time or other kindred causes, it is a case appropriate to equity. As issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, a province or a State is and shall be.'[1]

Precedents examined.

After quoting a portion of the opinion of Chief Justice Taney in the case of *Massachusetts* v. *Rhode Island* (14 Peters, 210, 256), referring to the cases of *New Jersey* v. *New York* (5 Peters, 284), *Missouri* v. *Iowa* (7 Howard, 660), *Florida* v. *Georgia* (17 Howard, 478), *Alabama* v. *Georgia* (23 Howard, 505), *Virginia* v. *West Virginia* (11 Wallace, 39), *Missouri* v. *Kentucky* (11 Wallace, 395), *Indiana* v. *Kentucky* (136 U.S. 479), and *Nebraska* v. *Iowa* (145 U.S. 519), which have been discussed in the course of this narrative, and all of which were suits in equity, involving the boundaries of States, Mr. Justice Harlan stated that it was not necessary for the court to examine the question anew. The rule applicable to a suit in which the State was plaintiff as well as defendant was, in the opinion of the majority of the court, applicable to a case in which a State was defendant and the United States plaintiff. Thus, he said:

Of course, if a suit in equity is appropriate for determining the boundary between two States, there can be no objection to the present suit as being in equity and not at law.[2]

[1] *United States* v. *State of Texas* (143 U.S. 621, 647).

[2] *Ibid.* (143 U.S. 621, 648).

With this announcement, Mr. Justice Harlan might have concluded his opinion, and assuredly Mr. Justice Baldwin, in that phase of *Rhode Island* v. *Massachusetts* (12 Peters, 657), in which the jurisdiction of the court was tested and sustained, would have sought to minimize the far-reaching nature of the decision by assimilating it to an ordinary partition of realty, although drawing with it, in the case of States, sovereignty to the line of boundary. The court was then feeling its way, as it were; but in the half century between the two cases the court had become aware of its power in the premises, and had grown in the confidence of the States, whose just rights were protected by its decrees. Therefore, Mr. Justice Harlan dwelt, and properly, upon the magnitude of the case, saying:

It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity.[1]

Demurrer overruled.

Mr. Chief Justice Fuller and Mr. Justice Lamar felt obliged to dissent from the opinion of the majority of the court. The opinion of Mr. Chief Justice Fuller, in which Mr. Justice Lamar concurred, can perhaps be considered as an expression of personal opinion rather than one which they felt likely the court could be brought to entertain. It is exceptionally brief and does not argue the question, as the reader will see from the text in its entirety:

Dissenting opinions.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to 'controversies between two or more States'; 'between a State and citizens of another State'; and 'between a State or the citizens thereof, and foreign States, citizens or subjects'. Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.[2]

Comments on preceding group of cases.

The cases grouped in this section should be well weighed and pondered by the opponents of judicial settlement and by those who believe in peaceable settlement but who are not yet convinced that judicial settlement is possible between states, or, if possible, that it is necessarily limited to matters 'of small pith and moment'. We have a decision of the Supreme Court of the United States passing upon the knotty questions involved in the separation of one State from another, *Virginia* v. *West Virginia* (11 Wallace, 39), the determination of a boundary dispute of an international character, *Nebraska* v. *Iowa* (143 U.S. 359), *Missouri* v. *Kentucky* (11 Wallace, 395), *Indiana* v. *Kentucky* (136 U.S. 479), the complaint of a State against an obstruction

[1] *United States* v. *State of Texas* (143 U.S. 621, 648) [2] *Ibid.* (143 U.S. 621, 648–9).

in a river of the adjoining State in the nature of a nuisance, *South Carolina* v. *Georgia* (93 U.S. 4), the restriction of the right of a State to sue to cases in which it appears in its own interest and not in behalf of the title of a citizen, *New Hampshire* v. *Louisiana* (108 U.S. 76), and two cases in which the United States appears in the Supreme Court as plaintiff against one of the United States, *United States* v. *North Carolina* (136 U.S. 211), *United States* v. *Texas* (143 U.S. 621).

The mere enumeration is a fact as well as an argument, and carries conviction, if the mind be open to conviction. We may close our eyes if we will to the obvious, but the obvious exists. We may, if we are blind, shake our head at the sun or the stars, and, if we be deaf, stand unmoved before the roaring Niagara, but if we have eyes to see and ears to hear, we must perforce admit that the spectacle of States, sovereign within their respective spheres, summoning their equals before a court of justice to litigate a controversy of a justiciable nature, and the appearance of those States in response to this summons, including the United States, whose sovereignty, power, and majesty cannot be gainsaid, are precedents of no mean order, capable and worthy of being followed by the members of the society of nations, which we cannot regard as less able, less enlightened, less capable of deciding their controversies by judicial process, if only they are minded to do so, than the United States and the forty-eight States composing the American Union.

VII.

CONFIRMATORY DECISIONS: 'GOVERNMENT OF LAWS AND NOT OF MEN'.

32. State of Nebraska v. State of Iowa.

(145 U.S. 519) 1892.

Agreement of the parties upon the boundary (*vide* p. 264, *ante*).

The first case of *Nebraska* v. *Iowa* (143 U.S. 359) was decided by the Supreme Court in 1892, in a controversy due to the fact that the Missouri River, the boundary between the two States, had suddenly changed its course and seriously affected the line, if it was to follow the river, but did not seriously affect it if the line was to be considered as the channel over which its waters flowed. The Court held, it will be recalled, that in the case of gradual change, known as accretion, the river still remains the boundary, but in case of sudden and violent change, known as avulsion, and as happened in that case, the boundary line remains where it was before and is to be found in the discarded channel. It will be further recalled that Mr. Justice Brewer, in delivering the opinion of the court, stated that no decree would be entered, as it appeared likely that, with the determination of the principle of law, the contending parties would thus be able to agree upon the line. This probability, no doubt due to an intimation which counsel for Nebraska and Iowa had made to the court, proved to be correct. Mr. Justice Brewer's language, however, is worthy of note, as showing how readily and how easily people do what they know they will have to do or that others will do if they themselves leave it undone. Thus, the learned Justice said :

> We think we have by these observations indicated as clearly as is possible the boundary between the two States, and upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed.

Counsel for Nebraska and Iowa met and agreed, and in the second phase of *Nebraska* v. *Iowa* (145 U.S. 519), decided in 1892, they presented themselves to the court in the October term of 1891. The cause was heard upon the pleadings and the proofs and argued by counsel; and, as the court says, in the only portion of this case and of the decree in the case which is material to the present purposes, the parties in litigation 'agreed upon a designation of the boundary in accordance with the principles set forth in the opinion of this court filed on February 29, 1892'. The court therefore ordered, adjudged, and decreed the boundary of the States of Nebraska and Iowa to be in accordance with the agreement of the parties, which agreement is set forth in the report of the case in language familiar to the surveyor but not over-attractive to the layman, but vastly important to States and to partisans of judicial settlement.

Boundary defined in accordance with the agreement.

33. State of Iowa v. State of Illinois.

(147 U.S. 1) 1893.

The State of Iowa seems to have had trouble about its boundaries and has been a source of annoyance and litigation to its neighbours. Without attempting to decide this difficult and delicate question, which would have taxed to the breaking point the Supreme Court, the fact is that Iowa has had disputes with Missouri, Nebraska, Illinois, but does not appear as yet to have had questions affecting its boundaries with Wisconsin, Minnesota, and South Dakota, the other three States contiguous to it.

A boundary dispute as to the channel of the Mississippi.

The present dispute, *Iowa* v. *Illinois* (147 U.S. 1), was the first of three cases with Illinois, and was due to the conflicting claims of the two States as to the channel of the Mississippi River which should separate them in law as the stream did in fact, Iowa insisting that the line should be drawn in the middle of that river, equally distant from its banks, without regard to the channel of navigation; Illinois contending, on the contrary, that it should be the main channel, the channel of commerce, or, as it was called, the steamboat channel of the river. The question arose in a very interesting way because of a bridge spanning the Mississippi between Hamilton, on the Iowa side, and Keokuk, on the Illinois side of the river. Iowa claimed and taxed the bridge to the mathematical centre of the stream. Illinois claimed and taxed the bridge to the steamboat channel. The claims of the two States overlapped, Iowa taxing 225 feet less of the bridge than it would be entitled to tax, taking the middle of the stream as its boundaries, and Illinois taxing 941 feet, including therein the 225 feet of the bridge which Iowa, according to its claim, could but did not tax. The claims of the States thus overlapped for a distance of several hundred feet, and the owners of the bridge were ground, as it were, between the upper and nether millstone.

Because of these circumstances and conditions, and because there were a number of bridges between the two States exposed to double taxation, and because of the desire, natural alike to man and State, to have boundaries settled beyond peradventure, Iowa filed its bill in the Supreme Court, setting up these facts. The State of Illinois filed its answer and also a cross-bill, alleging that nine bridges spanned the Mississippi between it and Iowa, and to the answer of the State of Illinois the State of Iowa filed a replication. The case was therefore before the Supreme Court of the United States upon the pleadings customary between private parties in an equity

suit, and likewise customary between the States, inasmuch as chancery practice, simplified and freed from technicalities, was, from the very beginning of judicial settlement under the Constitution, adopted by the Supreme Court as the form of procedure best calculated to secure justice between the States.

Opinion of the Court.

Mr. Justice Field, in delivering the opinion of the court, thus states, by way of introduction, the relation of the Mississippi to the two States and the conflicting claims of each to its waters :

The Mississippi River flows between the States of Iowa and Illinois. It is a navigable stream and constitutes the boundary between the two States ; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two States for the purposes of taxation and other purposes of government.[1]

There was no doubt that the middle of the Mississippi was the boundary between the States, and as a matter of fact it had always been the boundary of their predecessors in interest. By the treaty of 1763 between Great Britain, France, and Spain, the middle of the stream separated the British from the French possessions in North America. By the treaty of September 3, 1783, between Great Britain and the United States, the latter succeeded to the interest of Great Britain, comprising the State of Illinois, and by the purchase of Louisiana from France, under the treaty of April 30, 1803, the territory to the west was acquired, comprising the State of Iowa. So far as treaties went, the middle of the Mississippi had invariably been taken as the boundary between the neighbouring contiguous territories. The same was true of the States, for by the act of Congress of April 18, 1818, enabling the people of Illinois to form a State under the Constitution, the portion of the boundary material for present purposes was ' thence west to the middle of the Mississippi River, and thence down along the middle of that river to the confluence of the Ohio River '. And the boundary of the State was defined in the same way in the Constitutions of Illinois of 1818, 1848, and 1870.

Naturally, Iowa claimed to the middle of the Mississippi, bringing itself into touch with its eastern neighbour. It was therefore a fact that the boundary between the two States, as in the case of their predecessors in interest, was the middle of the Mississippi, and this fact was admitted by the States in their pleadings. But, admitting the middle of the stream to be in general the boundary between contiguous territory, the question presented itself whether, in a navigable river such as the Mississippi, the interests of commerce might not vary the boundary in such a way as to divide navigation between the States, giving each a share in the channel of commerce, and whether, if there be more than one channel of commerce, the deeper or deepest should not be chosen as the line between the States. As Mr. Justice Field says, summarizing the contentions of the two States, looking to the future rather than to the past, and to the very practical question as to the right and the power of the States to tax the bridges across the Mississippi :

To the end, therefore, that the boundary line between the States of Illinois and Iowa at said several bridges may be defined and settled, the State of Illinois prays that the State of Iowa be made defendant to this cross-bill, and required to answer it, and that upon the final hearing the court will define and establish at each of the bridges the boundary lines between the States of Illinois and Iowa, to which point

[1] *State of Iowa* v. *State of Illinois* (147 U.S. 1, 2).

the respective States may tax. To this cross-bill the defendant, the State of Iowa, answered, admitting the existence of nine bridges across the Mississippi River, where it forms the boundary between the States of Illinois and Iowa, and that the State of Illinois and its several municipalities bordering upon the river claim the right to tax said bridges from the Illinois shore of the river to the middle of the channel of commerce or steamboat channel, and that the State of Iowa and its municipalities bordering on the river claim the right to tax and do tax the several bridges to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel, that is, that part of the river usually traversed by steam or other vessels carrying the commerce of the river, may be. It therefore prays that upon the final hearing the boundary lines between the two States may be established, to which the respective States may tax.[1]

The dispute, therefore, was one of interest as well as of principle, and the principle was decided by the Supreme Court in accordance with the dictates of international law. Mr. Justice Field, speaking for the court, states the reason for the rule, as well as the rule itself, in the following passages :

The middle of the main channel is the dividing line.

When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line.

The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream', as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763.[2]

Authorities cited.

The learned Justice leaves the treaties and takes up the treatises. In the first place, he quotes an American authority, choosing in first instance Wheaton, who says in his *Elements of International Law* (8th ed. § 192) :

Wheaton.

Where a navigable river forms the boundary of conterminous States, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both ; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river.[3]

After quoting a further passage from Mr. Wheaton, to the effect that the channel of the Mississippi is frequently winding, 'crossing and recrossing perpetually from one side to the other of the general bed of the river', the learned Justice quotes the following very apt passage from Sir Edward Creasy's *First Platform on International Law* (§ 231, p. 222) :

Creasy.

It has been stated that, where a navigable river separates two neighboring States, the *Thalweg*, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquae*, was regarded as the boundary line ; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different

[1] *State of Iowa* v. *State of Illinois* (147 U.S. 1, 17).
[2] *Ibid.* (147 U.S. 1, 7–8).
[3] *Ibid.* (147 U.S. 1, 8).

from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation.[1]

Twiss. Mr. Justice Field also gives his approval to a passage which Sir Edward Creasy had himself quoted from Sir Travers Twiss, who observed that :

> Grotius and Vattel speak of the *middle of the river* as the line of demarcation between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary line of the navigable Midchannel. If there be more than one channel of a river, the deepest channel is the Midchannel for the purposes of territorial demarcation ; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression in its bed. . . . The islands on either side of the Midchannel are regarded as appendages to either bank ; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the Midchannel of the river will not operate to deprive that nation of its possession, although the water-frontier line will follow the change of the Midchannel.[2]

The learned Justice further refers to three distinguished authorities in matters international, Halleck, Woolsey, and Phillimore, and he quotes from the first two, stating the views of the third to be in accord. By reason of the importance of the subject, and the advisability of making it clear by concrete example that the Supreme Court applies the law of nations in the judicial settlement of disputes between States,

Halleck. these passages are quoted. Thus, Halleck says, in his *Treatise on International Law* (*c.* 6, § 23), published in 1861 :

> Where the river not only separates the conterminous States, but also their territorial jurisdictions, the *thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object.[3]

Woolsey. To the same effect Dr. Theodore Woolsey, then President of Yale College, said, in his admirable and fascinating introduction to the *Study of International Law* (§ 58), largely used by the United States in its diplomatic correspondence :

> Where a navigable river forms the boundary between two States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of the parties. If a river changes its bed, the line through the old channel continues, as before to the State whose territory the river has forsaken.[4]

After quoting the above authorities, Mr. Justice Field thus continues :

> The reason and necessity of the rule of international law as to the midchannel being the true boundary line of a navigable river separating independent States may not be as cogent in this country, where neighboring States are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law.[5]

As proving that the European doctrine is in force in America, and that the middle of the Mississippi really meant in fact the middle of the main channel of

[1] *State of Iowa* v. *State of Illinois* (147 U.S. 1, 8–9).
[2] *Ibid.* (147 U.S. 1, 9).
[3] *Ibid.* (147 U.S. 1, 9).
[4] *Ibid.* (147 U.S. 1, 9–10).
[5] *Ibid.* (147 U.S 1, 10).

commerce, the learned Justice enumerates concrete instances in the following passage from his opinion :

Federal statutes.

As we have stated, in international law and by the usage of European nations, the terms ' middle of the stream ' and ' midchannel ' of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 Stat. 428, c. 67,) under which Illinois adopted a constitution and became a State and was admitted into the Union, made *the middle of the Mississippi River* the western boundary of the State. The enabling act of March 6, 1820, (3 Stat. c. 22, § 2, p. 545,) under which Missouri became a State and was admitted into the Union, made the middle of *the main channel of the Mississippi River* the eastern boundary, so far as its boundary was conterminous with the western boundary of Illinois. The enabling act of August 6, 1846, (9 Stat. 56, c. 89,) under which Wisconsin adopted a constitution and became a State and was admitted into the Union, gives the western boundary of that State, after reaching the river St. Croix, as follows : ' Thence down the main channel of said river to the Mississippi, thence down the centre of the main channel of that ' (Mississippi) ' river to the northwest corner of the State of Illinois.' The northwest corner of the State of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary.[1]

The conclusion which Mr. Justice Field draws from these instances is very persuasive, and doubtless expressed the true meaning and intent of the legislation. Thus he says :

It is very evident that these terms, ' middle of the Mississippi River,' and ' middle of the main channel of the Mississippi River ', and ' the centre of the main channel of that river ', as thus used, are synonymous. It is not at all likely that the Congress of the United States intended that those terms, as applied to the Mississippi River separating Illinois and Iowa, should have a different meaning when applied to the Mississippi River when separating Illinois from Missouri or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing.[2]

Conflicting judgements of State courts.

After referring to and quoting from *Dunlieth and Dubuque Bridge Company* v. *County of Dubuque* (55 Iowa, 558, 565), in which the Supreme Court of Iowa sustained the contention of the State, and the case of *Buttenuth* v. *St. Louis Bridge Co.* (123 Illinois, 535, 548), in which the Supreme Court of Illinois sustained the contention of its State, thus showing the advantage of a Supreme Court unaffected by local feeling, Mr. Justice Field thus comments upon them and thus announces the decision of the court in the first phase of the case under consideration :

The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream ; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the States of the Union, which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the ' midchannel ', and, if there be several channels, to the middle of the principal one, or rather, the one usually followed.

Judgement that the boundary is the 'middle of the main navigable channel'.

It is therefore ordered, adjudged and declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River. And, as the counsel of the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings—nine in number— cross the Mississippi River, it is further ordered that

[1] *State of Iowa* v. *State of Illinois* (147 U.S. 1, 10–11).

[2] *Ibid.* (147 U.S. 1, 11).

Commissioners appointed.

a commission be appointed to ascertain and designate at said places the boundary line between the two States, such commission, consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make the proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action.[1]

34. State of Indiana v. United States.

(148 U.S. 148) 1893.

The case of *Indiana* v. *United States* is of interest and importance to the cause of judicial settlement, not because of the facts involved in it or the principle of law applied, but because of the parties—for the United States, by virtue of its consent to be sued in the Court of Claims, appeared as a defendant before that court at the instance of one of the United States. The case, a very simple one, was filed in the Court of Claims in 1889 by the State of Indiana as plaintiff against the United States as defendant to recover the sum of $412,184.97, alleged to be due to the State of Indiana out of the moneys which the United States had received from sales of public lands situated in that State. The Court of Claims dismissed the petition, and the petitioner, to use a technical expression, appealed to the Supreme Court of the United States in order to secure a reversal of the court below.

Claim for the proceeds of the sale of public lands.

History of the facts.

The record is replete with acts of Congress, more or less in point, and from the many only those will be mentioned upon which the Supreme Court based its judgement. The first is the act of April 30, 1802, for the admission of Ohio as a State of the Union, in which it was provided that five per cent. of the net proceeds of lands within the State, afterwards sold by Congress, 'should be applied to the laying out and making of public roads, leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State, and through the same, such roads to be laid out under the authority of Congress, with the consent of the several States through which the road shall pass'. By the act of March 3, 1803, it was provided that three per cent. of the proceeds thus raised should be paid, from time to time, to the State to be applied to the construction of roads within the State. By an act of March 29, 1806, the Congress provided for the construction of the road from Cumberland in Maryland, to the State of Ohio, known in history as the Cumberland or National road, and by subsequent acts, passed before the admission of Indiana as a State of the Union, appropriated for the building of that road sums amounting to $710,000, to be reimbursed out of the two per cent. fund; and it is a matter of history that the cost of the road during that period largely exceeded the moneys credited to the fund.

Act of Congress ordering the construction of roads out of the proceeds.

For the first time the State of Indiana makes its appearance in the statutes relating to this matter. By act of April 19, 1816, for the admission of Indiana as a State, it was provided that five per cent. of the net proceeds of the sale by Congress of the lands situated within that State should be reserved for the construction of public roads and canals, of which three-fifths thereof should be applied to those objects by the State itself and two-fifths thereof 'to the making of a road or roads leading to the said State under the direction of Congress'. By the act of April 11,

[1] *State of Iowa* v. *State of Illinois* (147 U.S. 1, 13–14). For the succeeding phase of this case, see *State of Iowa* v. *State of Illinois* (151 U.S. 238, *post*, p. 300).

1848, the Secretary of the Treasury was directed to pay the three-fifths of the proceeds to the State of Indiana.

The Cumberland road was eventually laid out and made a highway from the Ohio River opposite Wheeling, then in the State of Virginia, to the seat of government of the State of Missouri, and upon this road, open to the public and used by it, the Government mail was transported. By act of March 2, 1855, 'to settle certain accounts between the United States and the State of Alabama,' it was provided 'that the Commissioner of the General Land Office be, and he is hereby required to state an account between the United States and the State of Alabama, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled under the sixth section of the act of March 2, 1819, for the admission of Alabama into the Union; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw, Choctaw, and Creek Indians within the limits of Alabama, and allow and pay to the said State five per centum thereon, as in case of other sales'. Finally, for this is the last statute material to the present case, the act of March 3, 1857, 'to settle certain accounts between the United States and the State of Mississippi and other States,' directed the Commissioner of the General Land Office 'to state an account between the United States and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles of allowance and settlement as prescribed in the 'act of March 2, 1855, c. 139, and to include in like manner the reservations under Indian treaties'. In the portion of this act by which Indiana profited, it was provided that 'the said commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre'.

In 1872 the Commissioner of the General Land Office stated an account between the United States and the State of Indiana, by which the sum of $419,949.46 appeared to be due to that State because of the sales of the public and Indian lands thereof. He found, however, that the sums of money appropriated by Congress for the construction of roads, and which were to be reimbursed out of the proceeds of the five per cent. fund, which, to quote the official report, from which the above statement is paraphrased, 'would more than absorb the entire amount of the two per cent. which had accrued upon the sales of lands in Indiana; and that, therefore, in the absence of special legislation upon the subject, nothing would appear to be at present payable to the State of Indiana, except the sums of $47.12 on the three per cent. account and $6,333.73 for Indian reservations'.[1] In 1874 the sum of $6,380.85 was paid to Indiana, but was only accepted by that State as a payment upon account, not as a final settlement of the debt between the State and the United States. In 1889 the State of Indiana, insisting upon payment in full, made a formal demand upon the Commissioner of the General Land Office to state an account in accordance with the act of March 3, 1857. No account was stated. The petition, therefore, was filed in the Court of Claims, and from the decision of the court, rejecting the

Proceeds of the sale absorbed in road-making.

[1] *State of Indiana* v. *United States* (148 U.S. 148, 152).

petition, the suit was, as previously stated, carried on appeal to the Supreme Court.

In simple terms, unembarrassed by acts of Congress and other detailed provisions, it therefore appears that Congress authorized the construction of certain roads from the Atlantic to the State of Ohio, and provided that the expenses incurred in their construction should be reimbursed by the proceeds of the sales of the public and Indian lands within the States through which the roads passed; and inasmuch as the sums expended in their construction exceeded the proceeds of the sales of such lands, nothing was due to Indiana as one of the States through which the roads passed. If a trifling illustration be permissible in the case of a suit between a State and the United States, it was the case of Mother Hubbard going to the cupboard and finding it bare.

Judgement of the Court dismissing the claim.

Mr. Justice Gray, delivering the unanimous opinion of the court affirming the judgement of the Court of Claims, makes three preliminary statements, in the nature of a summary, which, as showing the question as it appeared to the Supreme Court, are quoted for the purpose of clearness:

By each of the acts of Congress, successively admitting the States of Ohio, Indiana, Illinois and Missouri into the Union, Congress agreed that five per cent of the net proceeds of public lands within the States, sold by Congress, should be applied to the making of a road or roads leading to the State; and by those and other acts it was provided that, of this five per cent fund, three per cent should be disbursed by the States, and two per cent by the United States. The general purpose was to promote the construction of a national highway connecting the new States in the interior with the old States on the Atlantic seaboard.

In the act for the admission of Indiana, the original obligation assumed by Congress in this respect did not define the termini of the road or roads to be built, or bind Congress to complete any road, or require the two per cent of the proceeds of the sales of lands in Indiana to be expended within the State; but the only obligation was to apply this two per cent fund 'to the making of a road or roads leading to the said State, under the direction of Congress'. It was for Congress to decide on what part of the road leading to Indiana this fund should be expended; and Congress had the right to treat the road as a whole, constructed for the benefit of all the States through which it passed.

It is unnecessary to determine whether this obligation was in the nature of a contract only, or whether it can be considered as in any sense constituting a trust; because, in either aspect, the contract has been performed, or the trust executed, by applying the fund in question to the making of a road 'leading to the said State' of Indiana.

It appears by the statement of the account between the United States and the State of Indiana by the Commissioner of the General Land Office, (which there is nothing in the case to control,) that the sums appropriated to the construction of the Cumberland road leading to the State of Indiana greatly exceeded the whole amount of the two per cent fund from sales of lands in the State; and that, therefore, in the absence of special legislation upon the subject, nothing was payable to the State of Indiana on account of this fund.[1]

The learned Justice—and no Justice of the court was more learned than he, unless it be Justice Story—after this opening statement, entered upon a brief discussion of the act of 1857 taken in connexion with the act of 1855 as determinative of the case, and thus concluded his opinion, distinguishing the claim of Indiana from that

[1] *State of Indiana* v. *United States* (147 U.S. 147, 153–4).

of the States of Alabama and Mississippi, through which States the roads were not constructed, and thus announced the judgement of the court :

Judgement for the United States.

The principles of settlement are that the United States shall be charged with the sums due, treating Indian reservations as sales. They may not be limited to Indian reservations, and may well include any unpaid balance of the three per cent fund which Congress had agreed should be disbursed by the States, as well as any part of the two per cent fund which had not been applied by the United States to the making of a road or roads according to their original obligation. But there is nothing, in any of the acts, upon the subject, which warrants the inference that Congress intended that, because the United States held themselves to be liable to Alabama and Mississippi for the two per cent fund which they had never applied as they had agreed, they should therefore be liable to the other States for the like two per cent fund which had been fully appropriated and expended in accordance with their obligations to those States.[1]

35. State of Virginia v. State of Tennessee.

(148 U.S. 503) 1893.

A boundary dispute.

With the first phase of *Virginia* v. *Tennessee* (148 U.S. 503), decided in 1893, the Commonwealth of Virginia appears in the Supreme Court for the second time as a litigant in a boundary dispute, the first being the case against West Virginia (11 Wallace 396), decided in 1870, which has already been considered ; and the third and last to date being the second phase of the dispute with Tennessee (158 U.S. 267), decided in 1895.

Fortunately the unanimous opinion of the court, delivered by Mr. Justice Field, is so full as to render superfluous an official statement on the part of the reporter and the arguments of counsel, and doubtless they were omitted by the reporter for this reason. The introductory statement of the learned Justice, not without interest in itself, has an added interest as stating that the jurisdiction of the court was so well established as not to be contested. Thus he says :

This is a suit to establish by judicial decree the true boundary line between the States of Virginia and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts.

No objection raised to the jurisdiction.

The State of Virginia, as the complainant, summoning her sister State, Tennessee, to the bar of this court—a jurisdiction to which the latter promptly yields—sets forth in her bill the sources of her title to the territory embraced within her limits, and also of the title to the territory embraced by Tennessee.[2]

In this simple and matter of fact way the learned Justice, speaking for the court, approaches a question which would have awed his predecessors ; and although he appreciates the importance of it, by stating what might happen in countries where courts were not armed with this power, and that in this respect the United States differ from other countries, he does not dwell upon it but mentions it in passing and

[1] *State of Indiana* v. *United States* (147 U.S. 147, 156).
[2] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 504).

as a necessary introduction to the case in hand. He thereupon proceeds to summarize, in the same businesslike and matter-of-fact fashion, the claims of the high contending parties, saying :

Virginia's claim based upon the charters,

The claim of Virginia is that by the charters of the English sovereigns, under which the colonies of Virginia and North Carolina were formed, the boundary line between them was intended and declared to be a line running due west from a point on the Atlantic Ocean on the parallel of latitude thirty-six degrees and thirty minutes north, and that the State of Tennessee, having been created out of the territory formerly constituting a part of North Carolina, the same boundary line continued between her and Virginia. And the contention of Virginia is that the boundary line claimed by Tennessee does not follow this parallel of latitude but varies from it by running too far north, so as to unjustly include a strip of land about one hundred and thirteen miles in length and varying from two to eight miles in width, over which she asserts and unlawfully exercises sovereign jurisdiction.

and Tennessee's upon agreement and possession.

On the other hand, the claim of Tennessee is that the boundary line, as declared in the English charters, between the colonies of Virginia and North Carolina was run and established by commissioners appointed by Virginia and Tennessee after they became States of the Union, by Virginia in 1800 and by Tennessee in 1801, and that the line they established was subsequently approved in 1803 by the legislative action of both States, and has been recognized and acted upon as the true and real boundary between them ever since, until the commencement of this suit, a period of over eighty-five years. And the contention of Tennessee is that the line thus established and acted upon is not open to contestation as to its correctness at this day, but is to be held and adjudged to be the real and true boundary line between the States, even though some deviations from the line of the parallel of latitude thirty-six degrees and thirty minutes north may have been made by the commissioners in the measurement and demarcation of the line.[1]

History of the controversy.

After this clear definition of the point at issue and a statement of the contending claims of Virginia and Tennessee, the learned Justice states that it is necessary to a correct understanding of the controversy to give a brief history of its antecedents, with a brief reference to the charters of the colonies of Virginia and North Carolina and to the legislation of the States of Virginia and Tennessee. An inspection of the map of the two States will make clearer than any amount of argument the nature and extent of the dispute, showing that the boundary line between North Carolina and Virginia, instead of being prolonged to the west in accordance with the original charters of the two colonies, turns abruptly to the north-east for a distance of about four miles to the summit of White Top Mountain at the north-eastern corner of Tennessee, from which it is carried west to the south-western corner of Virginia at the watershed of the Cumberland Mountains. From this it is continued due west as the boundary between Kentucky and Tennessee, returning to the line of 36° 30′ when it strikes the Tennessee River.

It is not necessary to follow in detail Mr. Justice Field in his analysis of the charters between the colonies of Virginia, on the one hand, and Carolina, later North Carolina, on the other, and the steps taken by them to draw the line of separation between them. It is sufficient for present purposes to say that the charter of Virginia was granted in 1609, that of Carolina in 1663, and that the colony of Carolina, with two distinct groups of settlements, in the south and in the north, was, in 1732, divided, according to these settlements, into South and North Carolina. ' Previous to this

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 504–5).

division ', to quote Mr. Justice Field, ' the settlements on the borders of Virginia, and of what was called the colony of North Carolina, had largely increased, and disputes and altercations frequently occurred between the settlers, growing out of the unlocated boundary between the provinces. Virginians were charged with taking up lands, under titles of the crown, south of the proper limits of their province, and Carolinians were charged with taking up lands which belonged to the crown with warrants from the proprietors. The troubles arising from this source were the occasion of much disturbance to the communities, and various attempts were made by parties in authority in the two provinces to remove the cause of them.' [1]

Early attempts to fix the line.

In 1728 a serious attempt was made to determine the line of separation, but it failed, as did its predecessors. It was important, however, as causing the Governors of North Carolina and Virginia to enter into a convention upon the subject, which was transmitted to England and approved by the King in Council and the lords and proprietors of North Carolina ; and the line, according to the agreement, was drawn from the Atlantic coast in 1728 some 320 miles to the west by commissioners appointed by the two colonies. So the matter rested until the Revolution, by virtue of which Virginia and North Carolina became independent States, and as independent States they were even more desirous to determine their boundaries and to assume the authority becoming independent States within their respective jurisdictions. In 1778 and 1779 they took up the question of boundary between them and ' appointed commissioners ', to quote Mr. Justice Field, ' to extend and complete the line from the point at which the previous commissioners . . . had ended their work on Steep Rock Creek, to Tennessee River. The commissioners undertook the work with which they were charged, but they could not find the line on Steep Rock Creek, owing, as they supposed, to the large amount of timber which had decayed since it was marked. The report of their labours was signed only by the Virginia commissioners.' [2] As the commissioners were unable to agree, two lines were drawn : that of the Virginia commissioners was known as Walker's line, and that farther to the north adopted by the commissioners of North Carolina as the Henderson line. Walker's line was approved by the legislature of Virginia in 1791, but was never approved by the legislature of Tennessee.

The next point to be observed is the respective action of Virginia and North Carolina, by which Virginia put an end to the controversies with its neighbours by expressly ceding to them all claims which it might have had to territories claimed by them, and North Carolina ceded to the United States, for admission as a State of the Union, the territory now forming the State of Tennessee. Mr. Justice Field's language, relating these circumstances, is as just as it is generous to the claims of Virginia, which State played such a large and controlling part in the formation of this more perfect Union :

Previously to the appointment of these commissioners, and on the 6th of May, 1776, the State of Virginia, in a general convention, with that generous public spirit which on all occasions since has characterized her conduct in the disposition of her claims to territory under different charters from the English government, had declared that the territories within the charters erecting the colonies of Maryland, Pennsylvania,

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 506–7).
[2] *Ibid.* (148 U.S. 503, 508–9).

North Carolina and South Carolina were thereby ceded and forever confirmed to the people of those colonies respectively. On the 25th of February, 1790, North Carolina ceded to the United States the territory which afterwards became the State of Tennessee, (2 Charters and Constitutions, 1664) and which was admitted into the Union on the 1st of June, 1796. 1 Stat. 491, c. 47.[1]

Joint boundary commission appointed, 1800.

Hereafter the controversy is between Virginia and Tennessee as the successor in interest of North Carolina. Therefore, in an attempt to settle the boundary line, which proved successful, the house of delegates of the general assembly of Virginia, in 1800, adopted the following resolution :

That the executive be authorized and requested to appoint three commissioners, whose duty it shall be to meet commissioners, to be appointed by the State of Tennessee, to settle and adjust all differences concerning the said boundary line, and to establish the one or the other of the said lines as the case may be, or to *run any other line* which may be agreed on, for settling the same ; and that the executive be also requested to transmit a copy of this resolution to the executive authority of the State of Tennessee.[2]

In 1801 the State of Tennessee enacted :

That the governor for the time being is hereby authorized and required, as soon as may be convenient after the passing of this act, to appoint three commissioners on the part of this State, one of whom shall be a mathematician capable of taking latitude, who, when so appointed, are hereby authorized and empowered, or a majority of them, to act in conjunction with such commissioners as are or may be appointed by the State of Virginia to settle and designate a true line between the aforesaid States.[3]

Report of the commissioners (1802)

The commissioners met, as stated in their report dated December 8, 1802, and ' *unanimously agreed,* in order to *end all controversy* respecting the subject, to run a due west line equally distant from both, beginning on the summit of the mountain generally known by the name of White Top Mountain, where the north-eastern corner of Tennessee terminates, to the top of Cumberland Mountain, where the south-western corner of Virginia terminates, which is hereby declared to be the true boundary line between the said States '.[4]

ratified by the legislatures of both States (1803),

The State of Virginia ratified the report on January 22, 1803, 'as the *true, certain,* and *real boundary line* between the said States', making its ratification, however, conditional upon the ratification thereof by the State of Tennessee, which, on November 3, 1803, confirmed the report, stating specifically in the act ' that the boundary line between this State and the State of Virginia, as laid down, fixed, and ascertained by the said commissioners abovenamed in their said report above cited, shall be and is hereby fully and absolutely to all intents and purposes whatsoever, *ratified, established, and confirmed* on the part of this State as the *true, certain,* and *real* boundary line between the said States.' [5] On this action of the two States in controversy, Mr. Justice Field thus comments :

The line thus run was accepted by both States as a satisfactory settlement of a controversy which had, under their governments and that of the colonies which preceded them, lasted for nearly a century. As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed as the

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 509–10).
[2] *Ibid.* (148 U.S. 503, 510–11).
[3] *Ibid.* (148 U.S. 503, 511).
[4] *Ibid.* (148 U.S. 503, 512).
[5] *Ibid.* (148 U.S. 503, 514–15).

true, certain and real boundary line between them ; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed from by the government of either, but be respected, maintained and enforced by the governments of both. All modes of legislative action which followed it indicated its approval. Each State asserted jurisdiction on its side up to the line disintegrated, and recognized the lawful jurisdiction of the adjoining State up to the line on the opposite side. Both States levied taxes on the lands on their respective sides and granted franchises to the people resident thereon. The people on the south side voted at state and municipal elections for representatives and officers of Tennessee, and the people on the north side at such state and municipal elections voted for representatives and officers of Virginia. The courts of the two States exercised jurisdiction, civil and criminal, on their respective sides, and enforced their process up to that line ; and the legislation of Congress in the designation of districts for the jurisdiction of courts, and in prescribing limits for collection districts and for purposes of election, made no exception to the boundary as thus established. Act of July 1, 1862, 12 Stat. 423, 433, c. 119.[1]

and always acted upon subsequently.

The line thus indicated was, the court says, marked with great care 'with five chops on the trees in the form of a diamond, at such intervals between them as they deemed sufficient to identify and trace the line '.[2] Fifty-four years after the marking, that is to say, in 1856, Virginia complained that, because of natural waste and destruction, the boundary line, carefully marked in 1802, had become indistinct, and asked that commissioners be appointed to meet commissioners from Tennessee to re-run the line, not, however, to mark a new one, and that the commissioners should, to quote the language of the court, 'cause monuments of stone to be permanently planted on the line, at least one at every five miles or less, where it might seem best to the commissioners to do so, that the line might be readily identified for its entire length.'[3] The commissioners met and the line of 1802 was re-run and re-marked. The legislature of Tennessee approved the action of the commissioners, but Virginia refused to do so, requesting new commissioners to re-run and re-mark the line, but not questioning the correctness of the boundary of 1802.

Line remarked, 1859.

This Tennessee refused as unnecessary. So matters stood until in its bill filed in the Supreme Court the Commonwealth of Virginia asked to have the line of 1802 set aside and the whole transaction declared to be null and void, on the ground that the compact between the States was entered into without the consent of Congress, which is required by the Constitution, and that the boundary between the States be fixed in accordance with the provisions of the charter of 1665 to Carolina, whereby the boundary line between the two colonies was to be a line due east and west 36° 30′ north latitude.

Mr. Justice Field, therefore, speaking for the court, found himself constrained to consider the constitutional question raised by Virginia, because of the tenth section of the second article of the Constitution providing that 'no State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State or with a foreign Power '. Admittedly the consent of Congress was not given before the agreement or compact, and it was not expressly given thereafter. If the express agreement of Congress was necessary before or after the agreement or compact, then it was clearly null and void ; if the express consent of Congress was not necessary, but might be implied from acquiescence, the agreement or compact

Question of an agreement without consent of Congress.

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 515–16).
[2] *Ibid.* (148 U.S. 503, 516). [3] *Ibid.* (148 U.S. 503, 516).

was binding upon the States, provided it was of the limited kind which the States could make consistent with their surrender of diplomatic negotiation to their agent, the United States.

This is the great point in the case, but although it depends upon the Constitution it is of international interest, as showing how a court would construe a similar provision in a convention between nations. There is, however, a second point, that of prescription, international in form and effect, but of less importance in this case, as the doctrine of prescription has already been held to apply between nations and states in previous decisions of the court. The language of Mr. Justice Field, speaking for the Supreme Court, unanimous on this point and on all other questions involved in this interesting case, will be freely drawn upon. The questions which confront us in this phase of the subject he thus states and defines :

Is the agreement, made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause ? The terms ' agreement ' or ' compact ' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects ; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.[1]

The terms, therefore, of the agreement or compact are very broad and flexible and the transaction may be innocent and permissible ; on the other hand, it may be within the prohibition of the Constitution. Its nature and its effect must determine. Of the first of these, Mr. Justice Field says :

Agreements which do not require the consent of Congress.

There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not be at the time in session.[2]

These illustrations carry conviction of themselves, but they lead naturally to the further question, thus stated by Mr. Justice Field :

If, then, the terms ' compact ' or ' agreement ' in the Constitution do not apply to every possible compact or agreement between one State and another, for the

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 517–18).
[2] *Ibid.* (148 U.S. 503, 518).

validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply ? [1]

The answer to this is not to be given off-hand. An agreement or compact interesting solely the parties to it, and without affecting the relations of the contracting parties to the States as a whole, would seem clearly to be permitted ; but the same act, when it affected the relations of the contracting parties to the States as a whole, would seem to be within the constitutional prohibition. The purpose of the Constitution was to invest their agent, the United States, with those powers which could best be exercised by all the States and in the interest of all, rather than by any one State, leaving by implication to the States all other powers which the States were unwilling to grant by implication or construction, inasmuch as they provided, by the tenth amendment, submitted to the States for their ratification by the first Congress under the Constitution, that ' the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people '.

It is possible to generalize and to classify the acts constituting an agreement or a compact, but each agreement or compact must be examined by itself, in order to see whether it conflicts with the intent of the Constitution. But we do not need to speculate and to call theory to our aid, inasmuch as the Supreme Court, in this case, passed upon the various phases of this question and interpreted authoritatively the intent of the Constitution, suggested indeed in previous cases and invariably followed in succeeding ones. Thus, on these very matters, Mr. Justice Field says :

We can only reply by looking at the object of the constitutional provision, and construing the terms ' agreement ' and ' compact ' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

Object of the constitutional prohibition.

Looking at the clause in which the terms ' compact ' or ' agreement ' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, (§ 1403), referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language ' may be more plausibly interpreted from the terms used, " treaty, alliance or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character ; such as treaties of alliance for purposes of peace and war ; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges ' ; and that ' the latter clause, " compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty ; such as questions of boundary ; interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other '. And he adds : ' In such cases the consent of Congress may be

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 518).

properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.' [1]

Accepting and applying the distinction laid down by Mr. Justice Story in his commentaries on the Constitution, that the intent of Congress was to prevent agreements or compacts, which Mr. Justice Field declared to be of a diplomatic character, appropriately called treaties or conventions, and which the States renounced the right to conclude, and restricted the same terms, treaty and compact, to less formal understandings, which may perhaps be called, merely for purposes of distinction, private treaties or conventions, Mr. Justice Field thus proceeds and ends this phase of the discussion:

Selection of commissioners imports no agreement.

Compacts or agreements—and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a compact or agreement with the adjoining State. It is a legislative declaration which the State and individuals, affected by the recognized boundary line, may invoke against the State as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority. If the boundary established is so run as to cut off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary, or rather for its adoption afterwards, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either State; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the States to the general government.[2]

In this passage it is to be observed that the learned Justice very properly points out the element of negotiation inherent in agreement or compact, and distinguishes from it the separate but concurrent action of each State within the scope of its jurisdiction, with the result that Virginia could, by an appropriate exercise of its sovereignty, define its boundary, that Tennessee, for the same reason, might likewise do so, and that the legislative act of each State, taking the same line as a boundary between them, would not be an agreement in the sense of the Constitution, as it did not involve negotiation or, in the language of the common law.

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 519–20).
[2] *Ibid.* (148 U.S. 503, 520–1).

a consideration passing from one State to the other for the agreement or the compact. We are thus prepared for Mr. Justice Field's conclusion that :

Agreement did not arise until mutual ratification.

There was, therefore, no compact or agreement between the States in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the States. Such ratification was mutually made by each State in consideration of the ratification of the other.[1]

So much for the consent of Congress to an agreement or compact between the States. Next, as to the time when this consent is to be given. It would, of course, be best that the consent be given in advance or at the time, thus removing doubt or uncertainty as to the validity of the agreement or compact. As the Constitution is silent on the point of time, it would naturally follow that the question of consent was of substance and the time a matter of form ; for, unless prohibited, consent may be tacit as well as express, and may arise from inaction and with full knowledge amounting to acquiescence. This phase of the question, not so fundamental, be it said, as the requirement of consent, is nevertheless of such importance as to justify its consideration. Again, to quote Mr. Justice Field :

The consent of Congress may be implied.

The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them ; and observes that where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part, there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relates to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced.[2]

The learned Justice was of the opinion, and it was the opinion of the court as well, that in the case in hand the Congress could not consent in advance, as each State was taking action to ascertain its own boundary, and that the consent required after the States had mutually agreed to accept the line drawn by the commissioners as binding upon them could and was in fact implied rather than expressed by Congress. Thus he says :

In the present case, the consent of Congress could not have preceded the execution of the compact, for, until the line was run, it could not be known where it would lie and whether or not it would receive the approval of the States. The preliminary agreement was not to accept a line run, whatever it might be, but to receive from the commissioners designated a report as to the line which might be run and established by them. After its consideration each State was free to take such action as it might judge expedient upon their report. The approval by Congress of the compact

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 521). [2] *Ibid.* (148 U.S. 503, 521).

The subsequent action of Congress implies consent.

entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings. The line established was treated by that body as the true boundary between the States in the assignment of territory north of it as a portion of districts set apart for judicial and revenue purposes in Virginia, and as included in territory in which federal elections were to be held, and for which appointments were to be made by federal authority in that State, and in the assignment of territory south of it as a portion of districts set apart for judicial and revenue purposes in Tennessee, and as included in territory in which federal elections were to be held, and for which federal appointments were to be made for that State. Such use of the territory on different sides of the boundary designated, in a single instance would not, perhaps, be considered an absolute proof of the assent or approval of Congress to the boundary line ; but the exercise of jurisdiction by Congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assent to it by that body as can usually be obtained from its most formal proceedings.[1]

Having appealed to Story as a jurist and as a professor of constitutional law, he appealed to Story as the lawyer and justice of the Supreme Court, citing the opinion of that very learned and that very sound judge on the exact question involved, in which he said, speaking for the court in the case of *Poole* v. *Fleeger* (11 Peters, 185, 209), decided in 1837 :

It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories ; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered, under the constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognized by the constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of congress. The constitution declares, that ' no state shall, without the consent of congress, enter into any agreement or compact with another state ' ; thus plainly admitting, that with such consent, it might be done.

Mr. Justice Field is, however, unwilling to rest the decision of the court upon an agreement or compact of the States, inasmuch as, to quote his own language :

Effect of long acquiescence in possession.

Independently of any effect due to the compact as such, a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant ; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in *Penn* v. *Lord Baltimore,* 1 Vesey Sen. 444, 448 ; *Boyd* v. *Graves,* 4 Wheat. 513 ; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 734 ; *United States* v. *Stone,* 2 Wall. 525, 537 ; *Kellogg* v. *Smith,* 7 Cush. 375, 382 ; *Chenery* v. *Waltham,* 8 Cush. 327 ; Hunt on Boundaries (3rd ed.), 306.[2]

The second point, that of prescription, need not be dealt with at length, inasmuch as it was elaborately discussed in the opinion of the court in announcing its decision in the case of *Rhode Island* v. *Massachusetts* (4 Howard, 591, 639),[3]

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 522).
[2] *Ibid.* (148 U.S. 503, 522–3).
[3] *Ante*, p. 177.

decided in 1846. Still, however, the question is one of international importance, and always interesting as showing that the Supreme Court of the United States is the chosen and common arbiter of the States in the settlement of their disputes. It is interesting to note, in this brief passage of Mr. Justice Field's opinion, that he does not content himself with a mere reference to domestic law, but that he broadens the scope of his investigation by quoting and making his own the language of two authorities of that system of law which the court was consciously administering :

Vattel and Wheaton cited.

Vattel, in his Law of Nations, speaking on this subject, says : ' The tranquillity of the people, the safety of the States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title.' (Book II, c. 11, § 149.) And Wheaton, in his International Law, says : ' The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation ; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question.' (Part II, c. 4, § 164.) [1]

But there was another reason given by the learned Justice for not disturbing the boundary lines drawn by commissioners of their choice and expressly ratified by the States themselves, even although such boundary line be not in exact accord with the terms of the charters or other parchments, which does honour to his heart, as, if it may respectfully be said, the other part of his opinion does to his head :

Moral considerations.

There are also moral considerations which should prevent any disturbance of long recognized boundary lines ; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided ; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life.[2]

It had been observed in argument that the line run in 1802 and confirmed in 1803 should, if it be sustained, be re-run and re-marked, so that it might be more readily identified and traced. From the many cases in which the court has directed and co-operated in the appointment of commissioners, it is apparent that a request of this kind would not fall upon deaf ears ; but with that regard for the rights of sovereign litigants which marks every phase of the procedure between States, it would be expected that the court, while willing to decree the re-marking of the line, would not care to exercise its authority, even at the request of the parties, unless the request was based upon adequate grounds, inasmuch as the court would not wish to do in such a high matter a useless thing. Therefore, the court said :

No new marking necessary.

But a careful examination of the testimony of the numerous witnesses in the case, most of them residing in the neighborhood of the boundary line, as to the marks and identification of the line originally established in 1802, and re-run and re-marked in 1859, satisfies us that no new marking of the line is required for its ready identification . . . Tennessee does not ask that the line of 1803 be re-run or re-marked.

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 523–4).
[2] *Ibid.* (148 U.S. 503, 523–4).

Nevertheless, under the prayer of Virginia for general relief, there can be no objection to the restoration of any marks which may be found to have been obliterated or become indistinct upon the line as herein defined.[1]

And on the whole case, speaking for the court, Mr. Justice Field said :

Judgement in favour of Tennessee.

Our judgment, therefore, is that the boundary line established by the States of Virginia and Tennessee by the compact of 1803 is the true boundary between them, and that on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the line.[2]

36. State of Iowa v. State of Illinois.

(151 U.S. 238) 1894.

The second phase of the case of *Iowa* v. *Illinois* (151 U.S. 238), decided in 1894, involves but a single point, and of no great importance in itself, but all suits between States are of fundamental importance to judicial settlement. The first time the case was before the court it was decreed that the middle of the main navigable channel of the Mississippi River, at the places where the nine bridges mentioned in the pleadings cross the said river, was to be the boundary line between the two States ; and it was ordered that a commission be appointed, to consist of three persons, to be named by the court on suggestion of counsel, ' to ascertain and designate at said places ' the boundary line between the States ; and the commission, as in all other cases, was to present its report to the court for further action.[3]

Appointment of commissioners (*vide*, pp. 285–6, *ante*).

Pursuant to this decree a joint request, dated January 19, 1893, was filed in the court on March 6 of that year, requesting the appointment of the commissioners, and, as a matter of urgency, that the line at the Keokuk and Hamilton bridge be located at once. Whereupon the court appointed the commissioners, and, because of the emergency, directed that they ' proceed at once to ascertain and mark the boundary line between said States at the Keokuk and Hamilton bridge, and report at once their action in that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterward they determine and mark the said State line at the other eight bridges, when requested by either party, and report the same '. On March 30, 1893, the commissioners filed their report as to the boundary line at the bridge mentioned, and on that day counsel for the State of Iowa moved for an order confirming the report, believing, and therefore stating, that the motion was consented to by the State of Illinois. Whereupon, on April 10, 1893, the court confirmed the report and ordered that the commissioners ' proceed to determine and mark the boundary line between said States throughout its extent '.[4]

On October 11, 1893, at the very beginning of the new term of court, counsel for Illinois moved to set aside the order confirming the report of the commissioners, on the ground that notice had not been given for its confirmation, and on the further ground that ' the consent of the State was signified to the court through mistake

[1] *State of Virginia* v. *State of Tennessee* (148 U.S. 503, 527–8).
[2] *Ibid.* (148 U.S. 503, 528). For the succeeding phase of this case see *State of Virginia* v. *State of Tennessee* (158 U.S. 267, *post*, p. 301).
[3] *State of Iowa* v. *State of Illinois* (151 U.S. 238, 240–1). [4] *Ibid.* (151 U.S. 238, 241).

and inadvertence'. Iowa opposed this motion, and numerous affidavits were filed on both sides. Upon a hearing of this motion, and after a careful examination of the papers, the court reached the conclusion that, through a misunderstanding or misapprehension, the order of confirmation was improvidently entered, in that the State of Illinois had not received due notice of the application and had not consented to the order. The subsequent phase of this case is given in the language of Mr. Chief Justice Fuller, who spoke for his brethren :

It is objected by the State of Iowa that the order of April 10 was a final finding and decree, and that it cannot be changed or set aside upon motion at a term of court subsequent to that at which it was entered ; but we regard the order as interlocutory merely. The confirmation of the report was but a step in the cause and not a final decree deciding and disposing of the whole merits of the cause, and discharging the parties from further attendance. We cannot dispose of the case by piecemeal, and until the boundary line throughout its extent is determined, all orders in the case will be interlocutory.

Report of the commission not confirmed.

In the exercise of original jurisdiction in the determination of the boundary line between sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded. Without intimating any opinion on the controversy raised as to the action of the commissioners, the order of April 10, 1893, so far as it confirms the report in question, will be vacated, and it is so ordered.[1]

37. State of Virginia v. State of Tennessee.

(158 U.S. 267) 1895.

The second phase of *Virginia* v. *Tennessee* (158 U.S. 267), decided in 1895, came before the Supreme Court in 1894 and turned upon a question of pleading. On April 15, 1895, the Commonweath of Virginia, by its Attorney-General, gave notice to the Attorney-General of Tennessee that, on May 6, 1895, he would move 'the Chief Justice and Associate Justices of the Supreme Court of the United States to enter as a decree of said court, in the case aforesaid, the decree in form and substance as set out in the paper marked " H ", attached hereto and made part and parcel of this notice, the said paper " H " being the form and substance of a decree and agreed by and between the counsel representing the parties plaintiff and defendant in the aforesaid cause'. The Attorney-General for Tennessee accepted service of the notice and consented that the decree in the form proposed by counsel for Virginia should be made 'in this cause', and without amendment to the original bill filed by the State of Virginia, if this could lawfully be done. The paper marked 'H' is a form of a decree marking the boundary line between the two States in controversy, and as there was no objection on the part of Tennessee to the line as such, it is to be presumed that it was in accordance with the decree of the court in the first phase of the case.

Motion for a decree by consent of the parties.

With the consent of the States, it would appear to the layman that the court would gladly enter the proposed decree, thus terminating the conflict. As it would, however, have been irregular to do so, inasmuch as the application to run and

[1] *State of Iowa* v. *State of Illinois* (151 U.S. 238, 241–2). For the final phase of this case see *State of Iowa* v. *State of Illinois* (202 U.S. 59), decided in 1906 (*post*, p. 425).

re-mark the line of 1803 should have been addressed to the court while it was still in possession of the case, and it could not be entertained after the expiration of the term in which the court had denied the motion to run and re-mark the line of 1803. The reason for this action is thus stated by Mr. Chief Justice Fuller on behalf of the Supreme Court :

Motion refused on technical grounds.

Subsequently, on May 15, 1893, a motion was made on behalf of the State of Virginia to restore the boundary marks between the two States alleged to be indistinct and obliterated, and to allow complainant to take additional testimony, the consideration of which was postponed to October term, 1893, when and on October 16, 1893, the motion was denied. Application is now made on behalf of the State of Virginia to this court to enter a decree in this cause for the remarking of the boundary line as set forth therein, to the granting of which the State of Tennessee consents. But we find ourselves unable to enter the order desired, as our power over the cause ceased with the expiration of October term, 1893, and it should not have been retained on the docket. The application must therefore be denied, but without prejudice to the filing of a new bill or petition, upon which, the parties being properly before the court and agreeing thereto, such a decree may be entered.[1]

From the statements repeatedly made in the opinions of the justices speaking for the Supreme Court in cases between States, it must have been a source of regret that, by its decree, the boundary line between Virginia and Tennessee could not be re-run and re-marked, as the States themselves were willing to have it done.

Importance of correct practice.

But a great English judge once said that it was even of more importance to the business of the world to have the law settled than to have it settled in any particular way. The States can have no greater guarantee for the administration of justice between them than the certitude that the Supreme Court will decide according to the rule, not according to what may be the desires of individual members, and that the fundamental rule shall be observed in practice and under what must have been trying circumstances ; and that consent of the parties litigant cannot ' confer jurisdiction ' where, for good and sufficient reason, the court is without it. The rights of the parties were not prejudiced by this decision. Virginia could, as the court stated, file an appropriate bill in the court, with the assurance that the State of Tennessee would, in appropriate form, consent to the prayer contained in the bill that the boundary line of 1803 should be re-run and re-marked, either in its entire extent or in any and all places where, by action of time, it had become indistinct or obliterated.

38. State of Indiana v. State of Kentucky.

(159 U.S. 275) 1895.

Just as in the two previous cases, the case of *Indiana* v. *Kentucky* (159 U.S. 275), decided in 1895, is a second phase of the controversy between these States.[2] The court, it will be recalled, decided in favour of Kentucky, as it found ' that the Ohio River at the date of separation flowed to the north of Green River Island. Therefore the Court decreed the Island to Kentucky, and likewise recognized the right of

[1] *State of Virginia* v. *State of Tennessee* (158 U.S. 267, 270–1). For the succeeding phase of this case see *State of Tennessee* v. *State of Virginia* (177 U.S. 501), *post*, p. 344.

[2] The first phase is reported as *State of Indiana* v. *State of Kentucky* (136 U.S. 479), decided in 1890, *ante*, p. 256. For subsequent phases see *post*, p. 329 (163 U.S. 520), decided in 1896, and p. 332 (167 U.S. 270), decided in 1897.

Kentucky to exercise jurisdiction beyond the Island to low-water mark on the southern shore of Indiana, although the channel of the Ohio had, subsequently to the separation, shifted to the south of the Island. The court stated as a material portion of its judgement, that 'commissioners will be appointed to ascertain and run the boundary line as herein designated and report to this court, upon which appointment counsel of the parties will be heard on notice'.

Commissioners appointed.

In accordance with this judgement, counsel for Indiana and Kentucky appeared at the bar of the court in the October term of 1895, stating that they had agreed upon the appointment of commissioners, and submitted a draft of an order in accordance with the judgement, which they moved to have entered as the decree of the court or as the basis thereof. The court, speaking in the person of Mr. Chief Justice Fuller, appointed three commissioners, recommended by counsel, 'to ascertain and run the boundary line between the said States of Indiana and Kentucky, as designated in the said opinion of this court heretofore filed, and judgment and decree heretofore entered herein, and to report to this court with all reasonable dispatch their doings in that behalf'.[1]

Thus ended the second of the four cases of *Indiana* v. *Kentucky*.

39. United States v. State of New York.

(160 U.S. 598) 1896.

The reader has already had an opportunity of considering one case in which the United States intervened in judicial proceedings between two States, *Florida* v. *Georgia* (17 Howard, 478), and two cases in which it appeared as a party plaintiff upon the record, *United States* v. *State of North Carolina* (136 U.S. 211), and *United States* v. *State of Texas* (143 U.S. 621), and, by a curious coincidence, three cases in which the United States appeared as a party defendant, *United States* v. *State of Louisiana* (123 U.S. 32); *United States* v. *State of Louisiana* (127 U.S. 182); *State of Indiana* v. *United States* (148 U.S. 148). The fourth of this series, endless it is to be hoped, was that of the *United States* v. *State of New York* (160 U.S. 598), decided in 1896, upon an appeal from the Court of Claims, in which the United States has specifically consented, by act of Congress, to be sued in certain specified cases by any person, natural or artificial, having a claim of the specified kind, and by a foreign person if its State allows itself to be sued by citizens of the United States. In the court below the suit was officially entitled *State of New York* v. *United States*, and as the United States appealed from the decision it is officially known as the *United States* v. *State of New York*, inasmuch as it is the practice of the Supreme Court to have its cases entered in the name of the plaintiff if it be begun in the Supreme Court, or in the name of the appellant if it reach that tribunal upon appeal.

The case was for a money judgement, different in origin from those already considered, and different in form, inasmuch as, pursuant to section 1063 of the Revised Statutes of the United States, the Secretary of the Treasury, in 1889, transmitted papers in the claim of New York against the United States, pending in the Treasury Department, to the Court of Claims, for adjustment and decision. The case falls naturally into two parts, the facts giving rise to it—which in themselves

[1] *State of Indiana* v. *State of Kentucky* (159 U.S. 275, 277).

are not without interest—and the principle of law to be applied, involving an interpretation of various acts of Congress affecting the jurisdiction of the Court of Claims, a subject then of importance, when they existed separate and distinct from one another, but of less interest to-day because of the Judiciary Act of the United States of March 3, 1913, in which the acts affecting the jurisdiction of that court have been amalgamated and codified.

In delivering the unanimous opinion of the Supreme Court, Mr. Justice Harlan thus briefly states the origin of the case, the facts involved, and the laws of Congress giving rise to it :

A claim for money spent on federal troops in 1861 and for interest thereon.

On the 3d day of January, 1889, the Secretary of the Treasury transmitted to the Court of Claims all the papers and vouchers relating to a claim of the State of New York against the United States, then pending in the Treasury Department, for interest paid on money borrowed and expended in enrolling, subsisting, clothing, supplying, arming, and equipping troops for the suppression of the rebellion of 1861. That claim, the Secretary certified, involved controverted questions of law, and exceeded three thousand dollars in amount. The communication accompanying the papers stated that the case was transmitted to the Court of Claims under and by authority of section 1063 of the Revised Statutes, to be there proceeded in according to law.

In further prosecution of this claim, the State promptly filed its petition in the court below and asked judgment against the United States for the sum of $131,188.02 with interest from the first day of July, 1862, together with such other relief as would be in conformity with law.

Claim based on an Act of Congress, 1861.

This claim was based on the act of Congress of July 27, 1861, c. 21, providing that ' the Secretary of the Treasury be, and he is hereby directed, out of any money in the Treasury not otherwise appropriated, to pay to the Governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury '. 12 Stat. 276.

By a joint resolution of Congress, approved March 8, 1862, it was declared that the above act should be construed ' to apply to expenses incurred as well after as before the date of the approval thereof '. 12 Stat. 615.[1]

Resisting the temptation to be drawn into an account of the origin and nature of the Civil War, in connexion with which this claim arose, it will conduce to its correct understanding to note in passing that the southern States of the Union, some ten in number, attempted to secede in law as they assuredly did in fact, forming a Union of their own called the Confederate States of America, because of the belief on their part that their local interests—and in this particular instance, the system of slavery—would be interfered with and the system of slavery abolished by amendment to the Constitution when the States of the Union opposed to slavery had so increased in number as to form the three-fourths majority required for its amendment, and in the belief that they could legally withdraw from this more perfect Union which Mr. Chief Justice Chase happily declared, in the case of *State of Texas* v. *White* (7 Wallace, 700, 725), decided in 1868, to be ' an indestructible union, composed of indestructible States '.

Attempts had been made to compromise the slavery question and to restrict

[1] *United States* v. *State of New York* (160 U.S. 598, 600–1).

it to the States in which it already existed. These attempts had failed in fact, because slavery entered the free territories in order to perpetuate the institution and to have these territories admitted as slave States ; and had failed in law, because the Supreme Court, in the case of *Sandford* v. *Scott* (19 Howard, 393), decided in 1856, and commonly known as the Dred Scott case, held laws restricting the area of slavery to be unconstitutional. An attempt was made, in the interest of equality of representation in the Senate, where each State has two Senators, to couple a free State with the admission of a slave State, and as the North was growing more rapidly in population, industry, and commerce, and therefore in influence, than the South, politicians of the North as well as of the South hit upon the successful and apparently happy device of nominating for the Presidency a northern man with southern principles.

But the attitude of the people, especially in the North, was changing, and the whole system changed in 1860, when Abraham Lincoln of Illinois was nominated by the Republican party, formed to oppose the progress of slavery, and elected to the Presidency. The days of compromise were past ; the days of principle had come. The South felt it as clearly, indeed more clearly, than the North, and on December 20, 1860, the people of South Carolina in convention assembled withdraw their ratification of the Constitution of the United States, thus seceding from this more perfect union. Other southern States followed, and upon Mr. Lincoln's inauguration, March 4, 1861, there were two governments in the erstwhile Union, that of Mr. Lincoln, claiming jurisdiction within the entire territory of the United States, and that of Mr. Jefferson Davis, claiming jurisdiction within the seceding States formed into a Confederation. To admit the validity of Mr. Lincoln's government would have been fatal to the Confederate States ; to admit the lawfulness of the Confederacy would have been fatal to the Union. Neither could compromise, neither would yield. The appeal to force by the South, attacking Fort Sumter, belonging to the United States, in the harbour of Charleston, on April 12, 1861, was met by an appeal to force on the part of the government of the Union. To obtain this force and fashion it for use President Lincoln called for volunteers, and in the enrolling, raising, equipping of volunteers the State of New York expended the sums of money which under the act of Congress it sought to obtain from the United States by argument in the Treasury Department and by judicial process in the Court of Claims.

Outbreak of the Civil War, 1861.

On April 15, 1861, the State of New York passed a statute, pursuant to which it enlisted, enrolled, armed, and equipped, and caused to be mustered into the service of the United States for the period of two years, some thirty thousand troops, to be employed in the maintenance of the Union. Mr. Justice Harlan, however, who served as a colonel in the Army of the North, says, 'in suppressing the rebellion'. The sum of $3,000,000 was appropriated out of any sums in the Treasury, and the State authorities for the fiscal year beginning October 1, 1861, imposed a State tax to meet authorized expenses not to exceed two mills on each dollar of real and personal property situated within the State. There was, however, no money in the treasury which could be used for the raising and equipping of the troops, inasmuch as all of the money of the State had been appropriated or allotted to specified purposes and the revenues authorized by the statute of April 15, 1861, would not reach the treasury and would not therefore be available for use until the months of April and May, 1862.

Raising of troops by New York.

Money raised by borrowing.

The money had to be obtained. It could not be made or seized. It had to be borrowed. The entire amount expended by the State, between April 23, 1861, and January 1, 1862, for enlisting, enrolling, arming, and equipping and mustering in its troops was $2,873,501.19, exclusive of interest upon the bonds or loans made by the State for that purpose. Of this sum it appears that, between June 3 and July 2, 1861, the State issued bonds in anticipation of its taxes to the amount of $1,250,000, payable on July 1, 1862, except the small sum of $100,000, made payable a month earlier, bearing interest at seven per cent., then the rate prescribed under the laws of that State. In addition to the principal, the State paid, during the years 1861 and 1862, the sum of $91,320.84, interest on the bonds issued in anticipation of the tax for public defence. The balance of the sum of $2,873,501.19 was borrowed from the Canal Fund of the State, a sinking fund for the ultimate payment of what was known as the Canal Debt, at the rate of five per centum per annum.

The moneys appropriated by the State for the benefit and to the credit of the Canal Fund reached the treasury in April and May, 1861, and were, pursuant to law, subject to be invested by the commissioners thereof in securities for the benefit of the Canal Fund. By the first of January, 1862, the United States repaid to the State, on account of advances by the latter, the sum of $1,113,000, which, with interest, was, on April 4, 1862, placed in the Canal Fund. This sum was $510,501.19 less than the amount of money used by the State from the Fund.

Judgement of the Court.

By way of recapitulation and statement of the case as it reached the Supreme Court on appeal from the Court of Claims, Mr. Justice Harlan, speaking for the court, says:

Details of claim.

The amount of interest at 5 per cent. per annum on the moneys of the Canal Fund during the time it was used by the State in raising troops was $48,187.13. But during the same time the State had received interest on portions of those moneys, while it was lying in bank unused, to the amount of $8,319.95, and the net deficiency of the State on account of interest on such moneys during the period when they were so used was $39,867.18, which sum was paid into the Canal Fund from the state treasury.

The total amount paid by the State for interest upon its bonds issued in anticipation of the tax for the public defence, and upon the moneys of the Canal Fund used for the purpose of defraying the expenses of raising and equipping troops, was $131,188.02. No part of that sum has been paid by the United States.

The moneys above specified as actually expended by the State of New York were necessarily expended for the purpose of enlisting, enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting such troops and causing them to be mustered into the military service of the United States, and were so paid and expended at the request of the civil and military authorities of the United States.

Prior to January 3, 1889, the State had presented, from time to time, various claims and accounts to the Treasury Department of the United States for charges and expenses incurred by it in enlisting, enrolling, arming, equipping, and mustering troops into the military service of the United States. Those claims amounted in the aggregate to $2,950,479.46, and included charges for all the moneys paid and placed as hereinbefore specified. The department, from time to time, allowed thereon various sums aggregating $2,775,915.24, leaving a balance of $174,564.22 not allowed, and the claims for which were pending in the Department unadjusted when this case was transmitted to the Court of Claims on the 3d day of January, 1889. Of that sum of $174,564.22 the sums hereinbefore specified amounting to $131,188.02, constituted a part.

The claim of the State for expenditures in furnishing troops with clothing and munitions of war was filed in the Treasury Department in May, 1862, and included the above items of interest. The claim for interest has from that time been suspended in the Department, and was so suspended at the time it was transmitted to the Court of Claims.

Cross-appeals from judgement of the Court of Claims.

The court, after finding the facts substantially as above stated, gave judgment in favor of the State for $91,320.84, on account of interest paid upon its bonds issued in anticipation of taxes imposed for the public defence. From that judgment the United States appealed. The State also appealed, and claims that it was entitled to judgment for the additional sum of $39,867.13 paid into what is called the Canal Fund as interest upon the moneys it had borrowed from that fund to be repaid with interest.[1]

Various statutes regulating the jurisdiction of the Court of Claims.

On appeal the Supreme Court of the United States found itself confronted with certain knotty questions raised in the court below, and upon which it seemed necessary to express an opinion and to reach a conclusion. If there had been no legislation considered by counsel relevant to this question, subsequent to and inconsistent with the letter or spirit of section 1063 of the Revised Statutes of the United States, the case would necessarily have had to be based upon that section, and as that section was interpreted the case would necessarily have been decided. But counsel alleged two subsequent statutes, the so-called Bowman act of March 3, 1883, 'to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government', and the so-called Tucker act, 'to provide for the bringing of suits against the Government of the United States'. It was therefore necessary for the Supreme Court to consider these acts, in order to determine if they were inconsistent with section 1063 of the Revised Statutes, and if inconsistent and applicable, whether it was the intent of Congress that the section of the Revised Statutes upon which this suit was based should be modified by these subsequent acts, in so far as they were inconsistent with its terms, or whether the acts were consistent in that, without affecting the jurisdiction of the Court of Claims as defined by the section of the Revised Statutes, they added other and additional remedies to those of the section in question. These questions, important when the case was before the Supreme Court, have merely an historical interest at the present day, inasmuch as the act of Congress of March 3, 1913, restated or codified the laws relating to the jurisdiction of the Court of Claims and incorporated in the sections devoted to that court those provisions of the so-called Bowman and Tucker acts, thus removing doubts as to their nature and effect and making of the legislation a consistent whole. For this reason, only so much of the opinion of the court on this matter will be laid before the reader as makes for a correct understanding of the decision.

§ 1063 of the *Revised Statutes*.

First. The exact text of Section 1063 of the *Revised Statutes of the United States* is thus worded:

Whenever any claim is made against any Executive Department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution

[1] *United States* v. *State of New York* (160 U.S. 598, 604–5).

of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.[1]

Without dwelling upon this section at length, it is advisable for present purposes to call attention to the fact that an executive department of the government is placed upon an equality with a claimant in the matter of a suit against the United States without, however, regard to the amount of money involved in the claim; that it is to be a claim whereof the Court of Claims could take jurisdiction at the instance of a private suitor; and that, finally, the court should act as a court, not as an advisory body, by reducing the claim to judgement in order that an appeal might lie to the Supreme Court of the United States, which held, in the leading case of *Gordon* v. *United States* (117 U.S. 697), decided in 1864,[2] that an appeal only lay from a decision of an inferior court on a judicial question in which a final judgement had been rendered, not from a decision and report of an inferior body, although the question might be of a justiciable nature, presented to the legislative and executive department for its confirmation, or such action as it might take in the premises. In other words, that an appeal only lies from judicial, not from administrative, discretion.

In accordance with this view, Congress made the decision of the Court of Claims final in specified cases, thus adopting the interpretation of the court as to the nature of a judicial question and its determination.

Bowman Act, 1883.

Next. The relevant portion of the Bowman act, passed by Congress on March 3, 1883, is as follows:

Sect. 1. Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or House may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the House by which the case was transmitted for its consideration.

Sect. 2. When a claim or matter is pending in any of the Executive Departments which may involve controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such

[1] *United States* v. *State of New York* (160 U.S. 598, 606–7).

[2] Mr. Chief Justice Taney had prepared and filed with the clerk of the court the opinion in this case, but unfortunately died before the assembling of the court. His opinion was, however, read by his brethren and made the basis of the conclusion reported in 2 Wallace, 561. The original of Mr. Chief Justice Taney's opinion was apparently mislaid, but a copy of it was found among his papers, and, at the request of the court, it was included in the appendix to 117 U.S. This is the more elaborate, and therefore the better, opinion, and the one usually referred to in considering this question.

rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the Department by which it was transmitted for its guidance and action.[1]

It is clear from the case of *Gordon* v. *United States* (117 U.S. 697) that if this section of the Bowman act was to operate as a repeal or modification of section 1063 of the *Revised Statutes*, the decision of the Court of Claims would be advisory only, and that no appeal to the Supreme Court would lie, at the instance of a private suitor or the government. It is to be noted that the Bowman act does not contain words of express repeal, and as the result of the different procedure to be followed under section 1063 of the *Revised Statutes* and the provisions of the Bowman act, the first being a judicial proceeding, resulting in a judgement, the second an investigation of claims, resulting in a report, but not a judgement, the court came to the conclusion that there was no inconsistency between the statutes, that they referred to different questions and provided different procedure, and that, to quote the exact language of Mr. Justice Harlan, speaking for the court, ' the second section of the Bowman act should be construed as if it were a proviso to section 1063 of the *Revised Statutes*.'

Finally. As to the Tucker act of March 3, 1887, four years later to a day than the Bowman act. The portions of this act material to the present purpose are : Tucker Act, 1887.

Sect. 12. That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, *with the consent of the claimant*, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.

Sect. 13. That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled ' An Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government ', approved March third, eighteen hundred and eighty-three [the Bowman act], if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court.'[2] (53)

In the first place, it is to be observed that the Tucker act is not inconsistent with the Bowman act, inasmuch as it presupposes the continued existence of its predecessor and provides for judgement ' in every case then pending in or which might come before the Court of Claims ' under the Bowman act, upon petition filed by a claimant seeking judicial determination of his claim against the government.

But the 13th section, while consistent with the Bowman act, nevertheless divides the claims arising under it into two classes, one in which the court could enter judgement at the instance of a private plaintiff, and the other class, in which judgement could not be entered. After discussing this phase of the question, Mr. Justice Harlan says, speaking for the court :

In our opinion the twelfth section of the Tucker act should be construed as not referring to claims which an Executive Department, proceeding under section 1063

[1] *United States* v. *State of New York* (160 U.S. 598, 608). [2] *Ibid.* (160 U.S. 598, 611).

of the Revised Statutes, seeks to have finally adjudicated by the Court of Claims, nor to claims described in that section, in respect of which the Department, upon its own motion, and whether the claimant consents or not, desires from that court a report under the Bowman act, of facts and law for its guidance and action. It refers only to claims which the head of an Executive Department, with the expressed consent of the claimant, may send to the Court of Claims in order to obtain a report of facts and law which the Department may regard as only advisory. It no doubt often happened that the head of a Department did not desire action by the Court of Claims in relation to a particular claim, but, in order to meet the wishes of the claimant, was willing to have a finding by that court which was not followed by a judgment, nor by any report for the guidance and action of the Department. So that section 1063 of the Revised Statutes, the second section of the Bowman act, and the twelfth section of the Tucker act may be regarded as parts of one general system, covering different states of case, and standing together without conflict in any essential particular. . . .

Touching the suggestion that the twelfth section of the Tucker act entirely superseded the second section of the Bowman act, it may be further observed that the Tucker act repeals only such previous statutes as were inconsistent with its provisions. There is no inconsistency between the sections just named; one, as we have said, the second section of the Bowman act, relating to claims involving controverted questions of fact or law, which an Executive Department may transmit to the Court of Claims without consulting the wishes of the claimant, in order to obtain a report of facts and law for its guidance and action; the other, the twelfth section of the Tucker act, relating to claims of the same class transmitted to that court with the expressed consent of the claimant, in order to obtain a report of facts and law that would be only advisory in its character.[1]

On this phase of the question, that is to say, the relation of section 1063 of the *Revised Statutes* to the Bowman and to the Tucker act, and the relation of each to the other, the learned Justice thus states, on behalf of the court:

Effect of the legislation summarized.

First. Any claim made against an Executive Department, 'involving disputed facts or controverted question of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States,' may be transmitted to the Court of Claims by the head of such Department under section 1063 of the Revised Statutes for final adjudication; provided, such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.

Second. Any claim embraced by section 1063 of the Revised Statutes, without regard to its amount, and whether the claimant consents or not, may be transmitted under the Bowman act to the Court of Claims by the head of the Executive Department in which it is pending, for a report to such department of facts and conclusions of law for 'its guidance and action'.

Third. Any claim embraced by that section may, in the discretion of the Executive Department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the Court of Claims, under the Tucker act, without regard to the amount involved, for a report, merely advisory in its character, of facts or conclusions of law.

Fourth. In every case, involving a claim of money, transmitted by the head of an Executive Department to the Court of Claims under the Bowman act, a final

[1] *United States* v. *State of New York* (160 U.S. 598, 613–14).

judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court, at the time such claim was filed in the department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication.[1]

Jurisdiction of the Court to give final judgement affirmed.

As the claim of the State of New York exceeded $3,000 and was certified to the Court of Claims under section 1063 of the *Revised Statutes*, as one involving controverted questions of law, the court had, by the express terms of the statute, jurisdiction to proceed to a final judgement, unless, as claimed by counsel for the United States, the claim was barred by the statute of limitations at the time of its transmission to the Court of Claims by the Secretary of the Treasury.

Question of limitation.

The question of limitation as one of fact need not detain us, otherwise than to ascertain the point of departure from which the period of six years, with which suit must be brought in the court, begins to run. Mr. Justice Harlan, on behalf of his brethren, overruled the bar of the statute, and in so doing relied upon three cases, from which he quoted. The first was the case of *Finn* v. *United States* (123 U.S. 227, 232), decided in 1887, from which he quoted the following passage :

Precedents examined.

The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute ; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.[2]

Accepting this as the general principle, the question is to determine when the claim accrued, so that it might be presented, because the statute could not equitably operate as a bar before the claimant had had an opportunity of having his claim considered by the court :

The second case, that of *United States* v. *Lippitt* (100 U.S. 663, 668, 669), decided in 1879, ascertains this date, and from this case, in which Mr. Justice Harlan rendered the opinion, the learned Justice quoted the following passage, with which he was doubly in accord :

Limitation is not pleadable in the Court of Claims, against a claim cognizable therein, and which has been preferred by the head of an Executive Department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued, that is, within six years after suit could be commenced thereon against the Government. Where the claim is of such a character that it may be allowed and settled by an Executive Department, or may, in the discretion of the head of such department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such cases, the statement of the facts, upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously and in due time been presented at the proper department for settlement. These

[1] *United States* v. *State of New York* (160 U.S. 598, 615–16). [2] *Ibid.* (160 U.S. 598, 617).

views find support in the fact that the act of 1868 describes the claims presented at an Executive Department for settlement, and which belong to the classes specified in its seventh section, *as cases* which may be transmitted to the Court of Claims. ' And all the cases mentioned in this section, which shall be transmitted by the head of any Executive Department, or upon the certificate of any auditor or comptroller, shall be *proceeded in* as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations,' with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the Government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the Court of Claims they are to be ' proceeded in as other cases in said court '.[1]

Mr. Justice Harlan re-enforces the views expressed in the Lippitt case by a further quotation from *Finn* v. *United States* (123 U.S. 227, 232) :

> The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition ; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that—except where the claimant labors under some of the disabilities specified in the statutes—the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the Government.[2]

Upon the authority of these cases the court decided, for the reasons stated in Mr. Justice Harlan's opinion, that the statute of limitations could not be pleaded as a bar, and therefore that the motion of the United States, to dismiss the appeal of the State on this ground, should be denied. Thus, he said :

Claim not barred by limitation.

> . . . we adjudge that, as the claim of New York was presented to the Treasury Department before it was barred by limitation, its transmission by the Secretary of the Treasury to the Court of Claims for adjudication was only a continuation of the original proceeding commenced in that department in 1862. The delay by the department in disposing of the matter before the expiration of six years after the cause of action accrued, could not impair the rights of the State. Of course, if the claim had not been presented to the Treasury Department before the expiration of that period the Court of Claims could not have entertained jurisdiction of it.
>
> For the reasons we have stated the motion of the United States to dismiss the appeal of the State is denied, and we proceed to the examination of the case upon its merits.[3]

Question of interest on the bonds.

The remainder of Mr. Justice Harlan's opinion deals with the question of interest, for the State of New York claimed $91,320.84 as the interest at seven per cent. which the State was required to pay on the short-time bonds issued until such time as the taxes should be levied and available for the expenses incurred in providing its quota of men. It also claimed the sum of $39,867.18 as interest paid on the money which the commissioners took from the Canal Fund and paid upon the money thus taken and appropriated to the same purpose—in all, $131,188.02—as part of the cost of the transaction, although in the form of interest.

As regards the first sum, counsel for the United States contended that, in addition to a statute (act of March 3, 1863, *Revised Statutes*, § 1091) forbidding the payment of interest on a claim to the time of its determination by the Court of Claims, the rule obtaining between nations, and therefore applicable between states, was

[1] *United States* v. *State of New York* (160 U.S. 598, 617–18).
[2] *Ibid.* (160 U.S. 598, 618).
[3] *Ibid.* (160 U.S. 598, 618–19).

and is, as held in *United States* v. *North Carolina* (136 U.S. 211, 216), that interest ' is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers '. The Supreme Court, however, while accepting this general principle, believed that the allowance of the sum of $91,320.84 would contravene neither the statute nor the general rule, inasmuch as the money raised was an aid to the government of the United States in the performance of a duty incumbent upon it, and that, in the circumstances of this particular case, interest was to be considered as a necessary part of the loan or as cost necessarily incurred in procuring it. To quote the exact language of the court on this point :

U.S. v. *North Carolina* (*ante*, p. 255) distinguished.

Liberally interpreted, it is clear that the acts of July 27, 1861, and March 8, 1862, created, on the part of the United States, an obligation to indemnify the States for *any* costs, charges, and expenses *properly incurred* for the purposes expressed in the act of 1861, the title of which shows that its object was ' to *indemnify* the States for expenses incurred by them in defence of the United States '.[1]

As to whether the interest should be included in costs, charges and expenses properly incurred, and as to whether these sums should be included in the expenses in defence of the United States for which the Congress should indemnify the States, Mr. Justice Harlan, speaking for the court, said :

So that the only inquiry is whether, within the fair meaning of the latter act, the words ' costs, charges, and expenses properly incurred ' included interest paid by the State of New York on moneys borrowed for the purpose of raising, subsisting, and supplying troops to be employed in suppressing the rebellion. We have no hesitation in answering this question in the affirmative.[2]

Claim for interest allowed as one of costs.

Speaking of the State and the embarrassing situation in which it found itself because the moneys in the treasury were appropriated to other objects, and the revenues to be derived from legislation could only be collected in the course of the year, the learned Justice said :

It could not have borrowed money any more than the General Government could have borrowed money, without stipulating to pay such interest as was customary in the commercial world. Congress did not expect that any State would decline to borrow and await the collection of money raised by taxation before it moved to the support of the nation.[3]

And he thus concluded his opinion on this first item :

Such interest, when paid, became a principal sum, as between the State and the United States, that is, became a part of the aggregate sum properly paid by the State for the United States. The principal and interest, so paid, constitutes a debt from the United States to the State. It is as if the United States had itself borrowed the money, through the agency of the State. We therefore hold that the court below did not err in adjudging that the $91,320.84 paid by the State for interest upon its bonds issued in 1861 to defray the expenses to be incurred in raising troops for the national defence was a principal sum which the United States agreed to pay and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon.[4]

So much for the interest on the bonds. Next as to the interest upon the moneys borrowed from the Canal Fund, which the Court of Claims rejected and which, as

[1] *United States* v. *State of New York* (160 U.S. 598, 621).
[2] *Ibid.* (160 U.S. 598, 621). [3] *Ibid.* (160 U.S. 598, 621). [4] *Ibid.* (160 U.S. 598, 621–2).

will presently be seen, the Supreme Court of the United States allowed. The interest paid upon the moneys withdrawn by the Commissioners from the Fund, and used in aid of the United States, amounted to $48,187.13 ; but as part of the fund on deposit in bank earned interest amounting to $8,319.95, the State deducted this latter item from the amount of interest with which the commissioners were taxed, and presented the claim for the difference, amounting to $39,867.18, on account of interest paid to that Fund, and which, if not paid, the Fund would be without. In view of the holding of the court that 'interest payable upon the bonds of the State was to be considered as costs incurred in procuring the money expended in aid of the United States', it would serve no useful purpose to argue the point. 'Suffice it to say,' in the language of Mr. Justice Harlan, 'that the Canal Fund was entitled to any interest earned upon moneys belonging to it, and fidelity to the constitution and laws of New York required the State to recognize that right in the only way it could at the time have been done, namely, by paying the interest that ought to have been realized by the commissioners of the Canal Fund, if they had invested in interest-paying securities the moneys they permitted the State to use for military purposes.'[1] And after laying down this principle the court thus proceeded to apply it :

The substance of the transaction was that the State, for moneys that could not be legally appropriated for the ordinary expenses of its own government, and which the law required to be so invested as to earn interest for the Canal Fund, used those moneys for military purposes, under an agreement by its officers, subsequently ratified by the State, to pay interest thereon. It was, in its essence, a loan to the State by the commissioners of the Canal Fund of money to be repaid with interest. . . . It could not legally have become a party to any arrangement or agreement involving the use, without interest, of the moneys of the Canal Fund that had been set apart for the ultimate payment of the canal debt.[2]

Judgement in favour of New York.

On this state of affairs the court therefore inevitably held :

We are of opinion that the claim of the State for money paid on account of interest to the commissioners of the Canal Fund, is not one against the United States for interest as such, but is a claim for costs, charges, and expenses properly incurred and paid by the State in aid of the General Government, and is embraced by the act of Congress declaring that the States would be indemnified by the General Government for moneys so expended.[3]

And on the whole question the court decided that :

As the State was entitled to a larger sum than $91,320.84, the judgment is reversed, and the cause is remanded with directions for further proceedings not inconsistent with this opinion.[4]

40. State of Missouri v. State of Iowa.

(160 U.S. 688) 1896.

The line marked by commission under first decree (*ante*, p. 190)

The first decree of the Supreme Court in the case of *Missouri* v. *Iowa* (7 Howard, 660), rendered in 1849, fixed the boundary line between Missouri on the south and Iowa on the north in accordance with the Sullivan line of 1816, although that line deviated slightly from the parallel of latitude generally chosen as the boundary line. In accordance with this decree, a commission was appointed to mark the line by

[1] *United States* v. *State of New York* (160 U.S. 598, 623).
[2] *Ibid.* (160 U.S. 598, 623–4). [3] *Ibid.* (160 U.S. 598, 624). [4] *Ibid.* (160 U.S. 598, 624).

visible and enduring monuments. The commissioners were appointed, their report presented and approved by the court in 1850, forming the second phase of the case, *Missouri* v. *Iowa* (10 Howard, 1). But monuments of States as well as of men have the habit of crumbling, and in the course of years the line, originally well marked, became indistinct, resulting in a confusion of boundary between the 50th and 55th mile-posts, and a consequent extension or denial of jurisdiction within the disputed region. Therefore the third phase of this controversy began, when in 1895 Missouri filed its bill against the State of Iowa (160 U.S. 688), and the third phase ended in February of the next year, when the Supreme Court appointed commissioners to remark that part of the boundary line of 1850 between the 50th and 55th mile-posts.

becomes indistinct in places.

The case was what might be called a friendly suit, as each State was annoyed because of the confusion of boundary and each was desirous to have it corrected. In the bill filed by Missouri, 'the complainant states', to quote a small portion thereof, 'that it is highly important to the States of Iowa and Missouri that the question of boundary should be speedily and finally settled; that heretofore the peace of the people of the States of Missouri and Iowa, especially in the county of Mercer, in the former, and the county of Decatur, in the latter, have been seriously disturbed in consequence of frequent conflicts of jurisdiction arising from differences of opinion as to the location of the said state line between said counties'.[1] After mentioning that adequate remedy does not exist at law, inasmuch as the controversy involved 'questions of jurisdiction and sovereignty', it is prayed that Iowa be made a defendant, and permitted to answer the complaint of Missouri upon final hearing 'that the northern boundary line of the State of Missouri, it being the boundary line between the complainant and defendant, be by the order and decree of this court ascertained and established; that the rights of possession, jurisdiction, and sovereignty of the State of Missouri to all the territory south of the line heretofore marked and run out by said J. C. Sullivan in 1816, re-marked by the commissioners heretofore named in 1850, and approved by the decree of the Supreme Court of the United States rendered as aforesaid, be restored to said State of Missouri, and that said State of Missouri be quieted in her title thereto, and that the defendant, The State of Iowa, be forever enjoined and restrained from disturbing the said State of Missouri, her officers and her citizens, in the full enjoyment and possession of the territory lying south of said line, and that such other and further relief may be granted as the nature of the case may require'.[2] By its Attorney-General, the State of Iowa filed its answer, denying some of the allegations, admitting others, and making averments on its own part, concluding that

Application for a fresh commission.

Said respondent, with the view to have an ultimate and final decision of the controversy, prays that this answer may also be treated as a cross-bill, and joins in the prayer of said complainant that the said boundary line between said complainant and respondent be, by the order and decree of this court, ascertained and established, and to that end that a commission be appointed, in such manner as to this court shall be deemed proper, to retrace the line traced and marked by the commission of this court in 1850, and as set forth in the decree of this court in the case of *State of Missouri* v. *The State of Iowa*, as aforesaid, and that such retracing of such line thus found be by such commissioners marked with fixed and enduring monuments, and

[1] *State of Missouri* v. *State of Iowa* (160 U.S. 688). [2] *Ibid.* (160 U.S. 688–9).

that the title of the State of Iowa in and to all territory north of the line thus found and marked be forever quieted in the said respondent, and for such other and further relief as equity and good conscience may require.[1]

In its replication to the answer and cross-bill filed by Iowa, counsel for Missouri again stated that officers of Iowa are exercising jurisdiction over territory to the south of the boundary line between the two States, and that, in order to prevent conflicts of jurisdiction, the boundary line should be re-established. As the parties were therefore agreed as to the necessity of retracing and re-marking the line, they formally agreed that a commission of three members be appointed, one by the State of Missouri, one by the State of Iowa, and the third by the two commissioners upon the failure of the States to agree, in order, without unnecessary delay, to 'retrace the line as run and located by Hendershott and Minor in 1850 between the 50th and 55th mile-posts on said line, beginning and ending the survey at such points as may be necessary to ascertain the true original line between said mile-posts, and, having found said true line, to mark the same by plain and enduring monuments and make report of their said retracing and survey of said line to this court'.[2]

Fresh commission appointed by the Court.

Mr. Chief Justice Fuller, on February 3, 1896, announced the decree of the court, and, in accord with the agreement of the parties, appointed the three commissioners upon whom the States had agreed, to re-draw and re-mark the boundary line between the two points in controversy, empowering them to request the co-operation and assistance of the State authorities in performing their duties; to report their proceedings in the premises on or before May 1, 1896; fixing the compensation of each commissioner at $10.00 a day; and, in case of vacancy through death or resignation, vesting in the court, or, if not in session, the Chief Justice, the power to fill the vacancy thus created.[3]

41. United States v. State of Texas.

(162 U.S. 1) 1896.

In the October term of the Supreme Court in the year 1891, the second and final phase of the great and leading case of *United States* v. *Texas* (162 U.S. 1) was argued, and on March 16, 1896, a date in judicial settlement, at least in the United States, the controversy of the United States, on the one hand, representing the states of the Union, with Texas, on the other, was decided in the Court of the States, specially vested with power to determine controversies between the States. In this grant of power, if all controversies which could arise between the States are not expressly included, none, as the great Chief Justice Marshall said, are excluded; so that necessarily, disputes which might be the cause of war between sovereign nations are peaceably and judicially settled between sovereign States of the American Union, without a resort to diplomacy or to war, which overshadows diplomacy and emerges upon its breakdown.

Question of jurisdiction already settled (*ante*, p. 267).

The first suit between the United States and Texas is the important one, and the second may be said to be its natural consequence. It is the exercise of the jurisdiction found to exist, and although in comparison it may seem to be outclassed by its predecessor, it must not be forgotten that jurisdiction exists to be exercised,

[1] *State of Missouri* v. *State of Iowa* (160 U.S. 688, 689). [2] *Ibid.* (160 U.S. 688, 690).
[3] For the final phase of this case see *State of Missouri* v. *State of Iowa* (165 U.S. 118), *post*, p. 332.

and that the exercise of jurisdiction is the clearest evidence of its existence. As soon as it was decided that the United States could sue the State of Texas, the case became one of fact, interesting or devoid of interest according to the nature of those facts. In this respect it is like other boundary disputes between the States, differing, if difference be insisted upon, in that treaties between foreign nations, not colonial charters, are the sources of title. The whole case turns upon the point from which a line shall be drawn east and west, and when that point is determined, the case is decided, although the suit is between the United States, which we fondly believe to be one of the great powers, and one of the States, united with forty-seven to make of their agent a great power. The proof to establish the dividing line between two sovereign jurisdictions is the proof to establish the line between two adjoining estates, and it only differs in name from such a suit.

An ordinary boundary dispute.

There are several treaties and an act of Congress having, as well be seen, the force of a treaty between the United States, on the one hand, and Texas, on the other, which are at once the source of title and the source of controversy. First, the treaty of February 22, 1819, between the United States and Spain; second, the treaty of January 12, 1828, between the United States and Mexico, which latter country had thrown off the domination of Spain, and had succeeded in its jurisdiction in this part of the world, which treaty, however, was in the matter of boundaries identical with that of 1819 between the United States and Spain; third, the treaty of April 25, 1838, between the United States and the Republic of Texas; and fourth, the act of Congress, approved September 9, 1850, 'proposing to the State of Texas the establishment of her northern boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a Territorial Government of New Mexico.'

Treaties with Spain, Mexico, and Texas, 1819–38.

Act of Congress, 1850.

The third and fourth articles of the treaty of February 22, 1819, between the United States and Spain, are the only ones material to the present question, and they are thus worded:

Art. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or *Red River; then following the course of the Rio Roxo, westward, to the degree of longitude* 100 *west from London and* 23 *from Washington*; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But, if the source of the Arkansas River shall be found to fall north or south of latitude 42°, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. All the islands in the Sabine, and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the Sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

The treaty line.

The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say,

the United States hereby cede to His Catholic Majesty, and renounce forever all their rights, claims and pretensions to the territories lying west and south of the above-described line ; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of the said line ; and for himself, his heirs, and successors, renounces all claim to the said territories forever.

Art. 4. To fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a Commissioner and a Surveyor, who shall meet before the termination of one year, from the date of the ratification of this treaty, at Natchitoches, on the Red River, and proceed to run and mark the said line, from the mouth of the Sabine to the Red River, and from the Red River to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42, to the South Sea ; they shall make out plans, and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree respecting the necessary articles to be furnished to those persons, and also as to their respective escorts, should such be deemed necessary. (8 Stat. 252, 254, 256.)[1]

A brief analysis of these two articles will not be out of place. The eastern boundary between the contracting parties was a line following the western bank of the Sabine River, thus vesting the United States with title to that stream to the 32nd degree of latitude. From this point the line is continued due north until it strikes the Red River. The Red River is not in doubt at this point, and the line follows the course of the Red River westward to its intersection with the 100th degree of longitude. If there were no doubt as to the identity of the river at this point, the controversy between the States would not have arisen, because the boundary then crosses the river and proceeds due north along that meridian until it crosses the Arkansas River. But before the 100th meridian is reached, there are two streams, each claiming to be the Red River ; or rather a northern branch called the North Fork of the Red River, which Texas claimed as the boundary and which, if accepted as such, would adjudge to Texas the disputed territory ; and the South Fork of the Red River, which the United States claimed to be the main stream of the river, and if accepted as such by the Court would adjudge the tract of land in dispute to the United States.

Which of two streams is the true 'Red River'.

In the next place, the whole region is to be understood as laid down by one, Melish, in his map of the United States published in Philadelphia in 1818, a map which was before and used by the negotiators in reaching an agreement. It is to be noted, however, that the 100th degree of longitude is specifically mentioned as forming the boundary between the Red River and the Arkansas River to the north, and it is to be presumed that the contracting parties referred to the Melish map as the best general description of territory with which they were unfamiliar, in that the map was taken as accurate in all respects. Inasmuch as the 100th meridian is inaccurately located on that map, and it is specifically stated by the court that 'that meridian, astronomically located, is more than 100 miles further west than is indicated by the Melish map'[2]—a fact not seriously debated by counsel in the case,—it is to be presumed that, when the contracting parties referred to the 100th meridian, they had

Treaty refers to Melish's map of 1818,

which proves to be inaccurate.

[1] *United States* v. *State of Texas* (162 U.S. 1).

[2] *Ibid.* (162 U.S. 1, 29).

in mind its exact location, on the familiar maxim that that is certain which can be rendered certain. This does not, of course, deprive the map of great authority in the decision of the case, because the negotiators had referred to it and the reference is incorporated in the text of the treaty; but it would seem to indicate that the geographer's configuration of the country is to be taken as accurate in general, not as necessarily accurate in all respects, and as decisive of natural land-marks, with which he might be inadequately acquainted, but not of scientific boundaries, as to which he was mistaken.

It is clear, however, that the 100th meridian, wherever found, is taken as the boundary, and it is a fact that such meridian crosses the Southern Fork claimed by the United States to be the main stream, and the North Fork of the Red River claimed by Texas as the river in question. This, as stated, is the crux of the controversy, and some light is thrown on it by the negotiations.

As in the case of a contract, so in the case of a treaty, there is an offer, often a series of offers, and an acceptance, and the offers show the intent of one or the other party, as the acceptance shows the intent of both. In the course of the negotiations preceding the treaty, Mr. John Quincy Adams, then Secretary of State and later the sixth President of the United States, made a proposal, under date of October 31, 1818, the terms of which are not necessary for present purposes, but which are very interesting as showing his conception of the Red River, or the branch thereof which he had in mind; for, after proposing the continuation of a line north from the Sabine until it strikes the Red River, he continues: Negotiations with Spain, 1818.

. . . thence, following the course of the said river, *to its source, touching the chain of the Snow Mountains* in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts, as marked on Melish's map; . . .[1]

If the matter stopped here it would be interesting but not important, as it would only show the understanding of one of the negotiators as regards the source of the river. But the matter does not stop here, for, on February 1, 1819, the Spanish Minister thus wrote to Mr. Adams:

Having thus declared to you my readiness to meet the views of the United States in the essential point of their demand, I have to state to you that His Majesty is unable to agree to the admission of the Red River *to its source*, as proposed by you. *This river rises within a few leagues of Santa Fé*, the capital of New Mexico. . . .[2]

The Melish map shows the Snow Mountains. The map also shows a stream in that region, and the South Fork of the Red River, nowadays commonly called the Prairie Dog River, flows in the region which Mr. Adams had in mind and justifies the objection stated by the Spanish Minister. The North Fork, on the contrary, is far to the north of this region and would not furnish a ground for the scruples of His Excellency, the Spanish Minister. Taking, however, the Red River as the boundary line, the Spanish Minister proposed to follow it westward to the 94th degree of longitude. Mr. Adams replied by suggesting the 102nd degree, and finally they compromised on a line from the point where the line drawn due north from the Sabine River strikes the Red River, thence westerly to the 100th meridian; and, although it is immaterial for present purposes, the 42nd degree of north latitude was adopted, instead of the 43rd degree, as proposed by Mr. Adams.

[1] *United States* v. *State of Texas* (162 U.S. 1, 24).

[2] *Ibid.* (162 U.S. 1, 25).

In the next place it may be said, by way of comment upon the text of the treaty, the contracting parties recognized that they were dealing with vast and unsettled tracts of territory, with which they were necessarily unfamiliar, and in order to settle the boundaries without allowing the two nations to drift into a dispute as to their exact location, the fourth article provided that each of the countries should appoint a commissioner and a surveyor, to meet within a year of the ratification of the treaty at the point where the line due north from the Sabine struck the Red River, and thence to proceed to run and to mark the boundary line, making the plans, the journal of their proceedings, and the result a part of the treaty and of the same force as if it were inserted therein. Unfortunately, governments do not take themselves very seriously as the agents of their citizens or subjects. Commissioners and surveyors were not appointed, they did not meet, and hence this controversy.

Failure to make a survey.

The treaty of 1828 between the United States and Mexico need not be considered, as Mexico was a successor of Spain and the boundary of 1819 was accepted by both countries. Ten years thereafter the Republic of Texas, as successor in interest of Mexico, negotiated a treaty with the larger Republic to the north and west. But before considering this treaty it is to be said that the Republic of Texas, before its independence was recognized by the United States, passed an act on December 19, 1836, in which its boundaries are described as follows :

> Beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line, as defined in the treaty between the United States and Spain, to the beginning ; and that the President be, and is hereby, authorized and required to open a negotiation with the government of the United States of America, so soon as, in his opinion, the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty.[1]

The President of the Republic of Texas, in pursuance of this authorization, concluded with the United States a convention (or treaty) on April 25, 1838, which recognized in its preamble that the treaty of 1828 between Mexico and the United States was binding upon Texas, inasmuch as Texas at that time ' formed a part of the United Mexican States ', and which further recognized it as proper and expedient, in order to avoid disputes between the United States and Texas within the territory designated by the treaty ' that a portion of the same should be run and marked without unnecessary delay '. The treaty provided in its first article that a commissioner and surveyor should be appointed within a twelvemonth of the exchange of ratifications of the convention (treaty) in order to run the line, following in this respect the procedure of the fourth article of the treaty between the United States and Spain in 1819 ; and in its second article that, until the line was run and the boundary marked, each of the contracting parties should continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been usually exercised.

Admission of Texas to the Union, 1850.

So matters stood, as far as the boundary line is concerned, until the act of Congress of September 9, 1850, although, in the meantime, Texas was, by joint resolution of the Congress of the United States, on March 1, 1845, consented to, and on December 29, 1845, actually provided for the admission of the Republic of Texas as a State

[1] *United States* v. *State of Texas* (162 U.S. 1, 31).

of the Union. The material portion of the act of September 9, 1850, approved by Texas, November 25, 1850, reads as follows:

Act of Congress, 1850.

First. The State of Texas will agree that her boundary *on the north* shall commence at the point *at which the meridian of one hundred degrees west from Greenwich* is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico. Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she *agrees to establish* by the first article of this agreement. Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom houses, custom-house revenues, arms and munitions of war, and public buildings, with their sites, which became the property of the United States at the time of the annexation. Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory and relinquishment of claims, will pay to the State of Texas the sum of ten million dollars in a stock bearing five per cent interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States, and agreed to 'be bound by the terms thereof, according to their import and meaning'. 9 Stat. 446, 447.[1]

Such were the formal acts of the parties in interest, from the date of the treaty between Spain and the United States of 1819 to the act of Congress of September 9, 1850, and the act of the State of Texas of November 25, 1850, accepting the terms and conditions of that act of Congress. Upon the judicial interpretation of these acts the boundary line between Texas and the United States depends, including the ownership of some 1,511,576.17 acres.

The case was very carefully and elaborately argued by counsel for the litigating parties. An immense mass of evidence was introduced, which Mr. Justice Harlan, who prepared the unanimous opinion of the court, considered, as became the importance of the case, and analysed, as necessary to justify the conclusions of the court. Fortunately for the reader it is not necessary to follow the learned Justice in his wandering through the disputed territory. One phrase, common to all of the treaties and statutes, is that the boundary from the intersection of a line due north from the Sabine, follows 'the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington'.

Two facts are involved, one natural, the other scientific: the true course of the Red River from the confluence of the North and South forks, and the exact location of the 100th meridian. The opposing views of the States in controversy are thus stated by Mr. Justice Harlan:

Opposing views summarized by the Court.

The contention of the United States is that this requirement cannot be met except by going westward along and up the Prairie Dog Town Form of Red River to the point where (as shown on the first of the above maps) that river intersects the 100th meridian—the government claiming that that river, and not the North Fork of Red River, is a continuation or the principal fork of the Red River, of the treaty.

The State insists that, even if the treaty be interpreted as referring to the true 100th meridian of longitude, and not to that meridian as located on the Melish map of 1818, 'the course of the Rio Roxo westward' from the intersection of the line

[1] *United States* v. *State of Texas* (162 U.S. 1, 33–4).

extending north from Sabine River to Red River, takes the line, not westwardly along the Prairie Dog Town Fork of Red River, but northwardly and northwestwardly up the North Fork of the Red River, (from its intersection with Red River,) to the point where the latter fork crosses the true 100th meridian, between the thirty-fifth and thirty-sixth degrees of latitude.[1]

The State, however, did not concede that the true meridian was meant by the parties who had before them the Melish map, and that the meridian as there located, although admittedly 100 miles east of its astronomical location, was to be taken by the court as it was accepted by the negotiators. The consequences which would flow from these two contentions on the part of Texas are thus briefly, yet adequately, stated by the learned Justice :

But at the outset of the discussion the State propounds this proposition : That the treaty of 1819 having declared that the boundary lines between the United States and Spain should be as laid down on Melish's map of 1818, it is immaterial whether the location of the 100th meridian of longitude on that map was astronomically correct or not, or whether the one or the other fork of Red River was or is the continuation of the main river ; that the map of Melish having fixed the 100th degree of longitude west from Greenwich below and east of the mouth of the North Fork of Red River, as now known, is conclusive upon both governments, their privies and successors. If this position be sound, the case is for the State ; for it is conceded that the entire territory in dispute is *west* of the 100th meridian, *as that meridian appears on the Melish map of* 1818, although it is, beyond all question, east of the true 100th meridian, astronomically located and as long recognized both by the United States and Texas.[2]

The court first considers the question of the meridian, for if the line of the cartographer be taken instead of that of the astronomer, it was immaterial to determine whether, according to Melish or according to the facts of the case, the northern or the southern fork was to be taken as the Red River of the treaty. At the outset the learned Justice admits that the Melish map is to be considered as if it were included in the treaty, and that the intention of the contracting parties is to be gathered from the treaty. After these two admissions the court sits in judgement upon the cartographer and the astronomer, and then passes to the acts of the government, in confirmation of the conclusions which that learned body felt itself justified in drawing in the matter of the latitude and the meridian of longitude as used by the negotiators. Thus, he says :

Undoubtedly the intention of the two governments, as gathered from the words of the treaty, must control ; and the entire instrument must be examined in order that the real intention of the contracting parties may be ascertained. 1 Kent Com. 174. For that purpose the map to which the contracting parties referred is to be given the same effect as if it had been expressly made a part of the treaty. *McIver's Lessee* v. *Walker*, 9 Cranch 173 ; *McIver's Lessee* v. *Walker*, 4 Wheat. 444 ; *Noonan* v. *Lee*, 2 Black, 499 ; *Cragin* v. *Powell*, 128 U.S. 691, 696 ; *Jeffries* v. *Omaha Land Co.*, 134 U.S. 178, 194. But we are justified, upon any fair interpretation of the treaty, in assuming that the parties regarded that map as absolutely correct, in all respects, and not to be departed from in any particular or under any circumstances ? Did the contracting parties intend that the words of the treaty should be literally followed, if by so doing the real object they had in mind would be defeated ? The boundary line was to begin at the mouth of the river Sabine, and continue north along the western bank of that river to the 32d degree of latitude. Was it intended that the Melish map should control in fixing the point where the Sabine

The map is part of the treaty,

[1] *United States* v. *State of Texas* (162 U.S. 1, 34–5).

[2] *Ibid.* (162 U.S. 1, 35).

River met that degree of latitude? Was the line due north from Sabine River to Red River to begin at the intersection of Sabine River with the true 32d degree of latitude, or where Melish's map indicated the place of such intersection? The two Governments certainly intended that the line should be run from the Gulf along the western bank of the Sabine River, and after it reached Red River that it should follow the course of that river, leaving both rivers within the United States. But it cannot be supposed that they had in view the intersection of Sabine River with any degree of latitude other than the true 32d degree of latitude, nor the crossing of the line extending along the Red River westward with any meridian of longitude other than the true 100th meridian. The fourth article of the treaty shows that the contracting parties contemplated that the line should be fixed with more precision than it was then possible to do; and to that end provision was made for the appointment of commissioners and surveyors, who should run and mark it, and designate exactly the limits of both nations—the results of such proceedings, it was declared, to be considered part of the treaty, having the same force as if inserted therein. Melish's map of 1818 was taken as a general basis for the adjustment of boundaries, but the rights of the two nations were made subject to the location of the lines, with more precision, at a subsequent time, by commissioners and surveyors appointed by the respective governments. So far as is disclosed by the diplomatic correspondence that preceded the treaty, the negotiators assumed for the purposes of a settlement of their controversy that Melish's map was, in the main, correct. But they did not and could not know that it was accurate in all respects. Hence they were willing to take it as the basis of a final settlement, the fixing of the line with more precision, and the designating of the limits of the two nations with more exactness, to be the work of commissioners and surveyors, who were to meet at a named time, and the result of whose work should become a part of the treaty. While the line agreed upon was, speaking generally, to be as laid down on Melish's map, it was to be fixed with more precision, and designated with more exactness by representatives of the two nations.[1]

but only as a general basis, subject to a precise survey.

But Mr. Justice Harlan was not obliged to reply upon speculation: the parties had acted. The United States had located and marked the true meridian, and Texas itself had recognized the true location of the meridian in fixing the boundaries of its counties. The act of Texas of December 19, 1836, already referred to, adopted the boundary line of the treaty with Spain and authorized the President of Texas to enter into negotiations with the President of the United States. The act of Congress of September 9, 1850, already adverted to, and accepted by Texas on November 25th of the same year, defined the boundary between the United States, on the one hand, and Texas, on the other, and in consideration of the sum of ten million dollars, paid to Texas in satisfaction of its cession of the territory not included within these lines, to the United States, could, as the court rightly said, be taken as a continuation of the negotiations between the States. It is to be remarked, in this connexion, that, in this very act of Congress approved by Texas, the true 100th meridian, the very line in question, is recognized in the matter of their boundaries. Thus:

The true meridian adopted in the Act of Congress, 1850.

> The settlement of 1850 fixed the boundary of Texas 'on the north' to commence at the point at which *the 100th meridian* intersects the parallel of 36° 30′ north latitude.[2]

Upon this statement Mr. Justice Harlan thus comments:

> The words 'the meridian of one hundred degrees west from Greenwich', in the act of 1850, manifestly refer to the true 100th meridian, and not to the 100th meridian

[1] *United States* v. *State of Texas* (162 U.S. 1, 36–8). [2] *Ibid* (162 U.S. 1, 39).

as located on the Melish map of 1818. The precise location of that meridian has not been left in doubt by the two governments. The United States has erected a monument at the point where the 100th meridian is intersected by the parallel of 36° 30′ north latitude. This was done many years ago, upon actual survey, and Texas has, by its legislation, often recognized the true 100th meridian to be as located by the United States. Looking at the above map of 1892, it will be seen that the counties of Lipscomb, Hemphill, Wheeler, Collingsworth and Childress are all immediately west of the 100th meridian. These counties were established in 1876. 3 Sayles' Early Laws of Texas, Art. 4285. The boundaries of each, as defined in the legislative enactments of Texas, are given in the margin. It will be seen that the eastern boundary of each county is the 100th meridian. By the act creating Lipscomb County, its boundary immediately south of the parallel of 36° 30′ north latitude, begins ' at a monument on the intersection of the 100th meridian and the thirty-sixth and a half degree of latitude '. That monument is the one established by the United States after the settlement of 1850. Peculiarly significant is the boundary of Childress County, one of the lines of which runs up Prairie Dog Town River—which river, the United States insists, constitutes the southern boundary of the territory in dispute—' to the initial monument on the 100th meridian.' The ' initial monument ' here referred to was erected in 1857 under the authority of the United States to mark the place where, as its representatives then and have ever since claimed the line, ' following the course of the Rio Roxo westward ', crossed the 100th meridian.[1]

The true meridian acted upon by Texas.

From the acts of the parties, thus stated, Mr. Justice Harlan concludes that ' the acts of the two governments and the evidence, therefore, concur in showing that the 100th meridian is not correctly delineated on the Melish map of 1818. And in the above settlement of a part of the boundary lines between the United States and Texas, the two governments have accepted the true 100th meridian and discarded the Melish 100th meridian. Giving effect to the compromise act of 1850 '—which the court regarded as a convention or contract in respect of all matters embraced by it—' the suggestion that the 100th meridian must be taken, in the present controversy, to be as located on the Melish map of 1818, is wholly inadmissible.' [2]

Mr. Justice Harlan stated, in concluding this portion of his opinion, and the opinion of the court, that a reasonable interpretation of the treaty of 1819 would force the court to adopt the astronomical and to reject the Melish meridian, and that, in any event, the convention or contract between the United States and Texas of 1850, and the subsequent acts of the two governments, required the acceptance of the true as distinct from the supposed meridian. With the elimination of the fictitious and the acceptance of the real meridian, the question became one of a natural as distinct from a scientific fact, the natural fact being the true course of the Red River west of the confluence of the northern and southern fork. So that the real question for solution is, to quote Mr. Justice Harlan's language ' whether, as contended by the United States, the line " following the course of the Rio Roxo *westward* to the degree of longitude 100 west from London," meets the 100th meridian at the point where Prairie Dog Town Fork of Red River crosses that meridian, or whether, as contended by the State, it goes *north-westwardly* up the North Fork of Red River until *that* river crosses the 100th meridian many miles due north of the initial monument established by the United States in 1857.' [3]

Question of the two rivers.

On this point the evidence was very voluminous, and ' much of it ', said Mr.

[1] *United States* v. *State of Texas* (162 U.S. 1, 39–41).
[2] *Ibid.* (162 U.S. 1, 41).
[3] *Ibid.* (162 U.S. 1, 42–3).

Justice Harlan, 'is of little value, and tends only to confuse the mind in its efforts to ascertain what was within the contemplation of the negotiators of 1819.' He considered it to be a matter of great regret 'that the question now presented, involving interests of great magnitude, should not have been determined, in some satisfactory mode, before or shortly after Texas was admitted as one of the States of the Union. It has remained unsettled for so long a time that it is not now so easy of solution as it would have been when the facts were fresh in the minds of living witnesses who had more intimate knowledge of the circumstances than any one can now possibly have upon the most thorough investigation.'[1]

Evidence of early maps and writers.

In the first part of this portion of his opinion, Mr. Justice Harlan invokes the testimony of geographers, whose maps were published before and after the treaty of 1819. It would serve no useful purpose to enumerate them and consider the maps in detail. The first which he quotes, and considers the most trustworthy, is Pike's 'Account of expeditions to the sources of the Mississippi and through the western parts of Louisiana to the source of the Arkansas, Kan, La Platte and Pierre Juan Rivers, performed by order of the government of the United States, during the years 1805, 1806 and 1807; and a tour through the interior parts of New Spain, when conducted through these provinces by order of the Captain General in the year 1807'. This work of authority, copyrighted in 1808 and published in 1810, was written by the distinguished explorer and engineer, Zebulon Montgomery Pike, whose name is perpetuated by Pike's Peak, and whose death, in 1813, in the storming of Toronto, then York, in the War of 1812 between Great Britain and the United States, perpetuates him in the memory of his countrymen. Pike's account contained numerous charts, and Mr. Justice Harlan says, 'those charts show a large river called Red River, extending from a point near Santa Fé between latitude 37° and 38° across what is now the State of Texas, passing Natchitoches, Louisiana. Both show a chain of mountains running north and south, marked on one chart as "White snow capped mountains, very high".' The learned Justice recalls, in this connexion, Mr. Adams's letter to the Spanish Minister, dated October 31, 1818, proposing 'that the line from east to west should follow the course of Red River "to its source, touching the chain of the Snow Mountains, in latitude 37° 25′ north, longitude 106° 15′ west, or thereabouts"'.[2] East of the Snow Mountains there are 'delineated on these charts', as Mr. Justice Harlan says, 'two prongs or small streams, "Rio Rojo" and "Rio Moro", the source of the former being northeast, and the latter nearly east, of Santa Fé. The Rio Rojo rises between the 37th and 38th, and the Rio Moro between the 36th and 37th degrees of latitude, both near the 106th degree of longitude. Between these prongs, on one of the charts, are the words, "Source of Red River of the Mississippi". The prongs or streams Rio Rojo and Rio Moro unite at about the 37th degree of latitude, and form one stream, marked on one chart as Red River, and on the other as "Rio Colorado [Red River] of Natchitoches". The stream, thus formed, runs for a short distance eastwardly, then southeastwardly until it reaches a point a little west of the 100th meridian, then eastwardly, then a little northeastwardly, then southeastwardly, passing Natchitoches, to a junction with the Wichita River near the Mississippi River. It should also be stated that on these charts is marked a road or line extending from Tous, (which is north of Santa Fé,) through a gap of the Snow

[1] *United States* v. *State of Texas* (162 U.S. 1, 43).

[2] *Ibid.* (162 U.S. 1, 48).

Mountains, and thence along the north side of Red River. That line is described as "The route pursued by the Spanish cavalry when going out from Santa Fé in search of the American exploring parties commanded by Major Sparks and Captain Pike in the year 1806". These charts or maps, in connexion with the chart of the lower part of Red River, not here reproduced, also show throughout the entire distance from Natchitoches to the source of Red River near the Snow Mountains, small streams emptying into the main river from the north and northwest, none of which, however, are marked with names; and that north of Red River, as delineated by Pike, and east of the 100th meridian of longitude. is an unnamed stream, not of great length, but having the same general course as the stream now known as the North Fork of Red River.'[1]

The learned Justice now considers the course and the source of the Red River as made out by Melish, whose map, it will be recalled, is referred to in the very treaty, and which plays so prominent a part in the trial and disposition of the suit. The language of Mr. Justice Harlan on this point, although somewhat lengthy, is quoted without comment, rather than paraphrased:

That prior to Melish's map of 1818 it was believed that the Red River that passed Natchitoches had its source in the mountains near Santa Fé is manifest from Melish's own publications. In 1816 he published at Philadelphia a small book, with the title 'A geographical description of the United States with the contiguous British and Spanish possessions'. It accompanied his map of those countries. In that work it appears that he used Humboldt's map of 1804, and Pike's Travels. He said: 'The Red River rises in the mountains to the eastward of Santa Fé, between north latitude 37° and 38°, and, pursuing a general southeast course, makes several remarkable bends, as exhibited on the map; but it receives no very considerable streams until it forms a junction with the Wachitta, and its great mass of waters, a few miles before it reaches the Mississippi.' pp. 13 and 39. See also the third edition of his work published in 1818, pp. 14 and 42.

On Darby's map of the United States, including Louisiana, published in 1818, and prefixed to his 'Emigrants Guide', appears the 'Red River of Natchitoches', formed by two prongs, and extending southeastwardly from a point near the intersection of the 107th degree of longitude and the 40th degree of latitude to its junction with waters near the Mississippi. East of the 100th meridian are two unnamed streams coming from the northwest, each much shorter than the main Red River, as delineated on that map. It is stated in this work that the Red River 'rises near Santa Fé in N. lat. 37° 30' and 29° west of Washington, runs nearly parallel to the Arkansas, joins the Mississippi at 31° N. lat. after a comparative course of 1100 miles.' p. 50.

In view of the facts stated, particularly in view of Melish's knowledge of Pike's publication and the statements in his own work, it cannot be doubted that when the Melish map of 1818 was published it was believed that there was a Red River that continued without break from its source near Santa Fé or the Snow mountains until it joined other waters east and southeast of Natchitoches, near the Mississippi.

Following the sourse of Red River, as laid down on the Melish map of 1818, it is impossible to doubt that in the mind of Melish the Red River was the stream represented by Pike as having two prongs, Rio Rojo and Rio Moro, near Santa Fé, and as running without break, first easterly, then southeastwardly, then eastwardly for a comparatively short distance, and then southeastwardly to its mouth near the Mississippi River. On the north and east of Red River, as thus marked, there was no stream connected with it that was marked by any name. There was an unnamed

[1] *United States* v. *State of Texas* (162 U.S. 1, 48–9).

stream, on the north side of the main river, which emptied into the latter between the 101st and 102d degrees of west longitude *as defined on that map*. If regard be had alone to the map of 1818, it is more than probable that the river marked on it as having near its source two prongs, Rio Rojo and Rio Moro, and which formed one stream that continued without break southeastwardly, and *into which*, between the 101st and 102d degrees of longitude, as *marked on that map*, came from the northwest an unnamed stream, was the river designated on Pike's chart as Red River, and was the Red River of the treaty of 1819. The suggestion that the river marked on the Melish map as having the two prongs, Rio Rojo and Rio Moro, and running southeastwardly, was the river now known as the North Fork of the Red River, is without any substantial foundation upon which to rest. If the latter river is delineated at all on the Melish map, it is the unnamed stream that entered the main river from the northwest, between the 101st and 102d meridians as located on that map.

There is a large amount of evidence of a documentary character showing that this interpretation of the Melish map is correct. We have before us ' A map of the United States, with the contiguous British and Spanish possessions, compiled from the latest and best authorities by John Melish '. It was copyrighted June 16, 1820, and published at Philadelphia by Finlayson, the successor of Melish. A part of that map is reproduced on pages 52, 53. It is spoken of as Melish's map of 1823, because that is the year to which it was improved. From that map it appears that a line up the Rio Roxo or Red River, from the northeastern corner of Texas to the 100th meridian, is substantially an east and west line, and that west of the 100th meridian it is westward and northwestwardly, *to a point near Santa Fé and the Snow Mountains*.[1]

Upon the case, as thus elaborately related, Mr. Justice Harlan draws the following conclusion :

If the case depended upon that map it could not be doubted that the territory in dispute is outside of the limits of Texas. The direction of the treaty is to run *westward*, not northwestwardly, on Red River *to the 100th meridian*. According to the view pressed by the State, the true line extends, from the junction of the North Fork of Red River with the Red River, northwardly, then easterly, then northwestwardly *up that fork*, although at such junction there is another wide stream, coming almost directly from the west, and which fully meets the requirement of the treaty to follow the course of the Red River *westwardly* to the 100th meridian. We do not feel authorized to assent to this view. In our judgment the direction in the treaty to follow the course of the Red River *westward* to the 100th meridian takes the line, not up the North Fork, but westwardly with the river now known as the Prairie Dog Town Fork, or South Fork of Red River, until it reaches that meridian, thence due north to the point where Texas agreed that its line 'on the north ' should commence.[2]

Evidence of later maps.

Mr. Justice Harlan, however, although satisfied that the South Fork is the main stream, and therefore decisive of the controversy, nevertheless is unwilling, in view of the importance of the case, to part with the geographers, but continues an examination of the succeeding maps, including those issued by the Republic and the State of Texas, after the Melish map of 1818 and the improved edition of 1823. From their examination, which must have been very painful as it is very detailed, he draws the following conclusions :

All of these maps place the territory in dispute east of the 100th meridian and *north* of the southern line of the Indian Territory *as that line is claimed by the United States*. They are all inaccurate, if any part of that territory is within the limits of

[1] *United States* v. *State of Texas* (162 U.S. 1, 49–51). [2] *Ibid.* (162 U.S. 1, 51).

Texas. No one of them so locates Red River that its course, going westward (from the point where the line between Texas and Louisiana intersects the Red River) to the 100th meridian would take the line of the treaty of 1819 up the North Fork of Red River until it intersected that meridian near the 35th degree of latitude.[1]

The case may well rest here, for, it being shown that Mr. Adams had in mind the Red River rising in the Snow Mountains, and thus, per his letter to the Spanish Ambassador in 1818, contemplated a line drawn westwardly called Red River, and that the Spanish negotiator likewise recognized, in his reply to Mr. Adams, that the stream arose in that region near Santa Fé, where the south fork then and now rises, the court was justified in concluding that the negotiators had in mind the boundary line following the course of the stream of the Red River, or that branch thereof rising within the region of the Snow Mountains and within the neighbourhood of Santa Fé. The court was fortified in its opinion by the account of Pike's explorations and its charts, showing the course of a stream known to be the Red River westwardly in such a way as to meet and to state the requirements of the treaty signed within nine years after the publication of that work. It is not stated in the case that Pike's account of his travels and explorations was before the eyes of the negotiators; but the author was a well-known figure, very much of a hero to the American people, and he was known to the Spanish authorities, because he had been captured within their territory, later released by the Captain-General, and his account covered a portion of New Spain. There was, therefore, reason why the Spanish negotiator should be familiar with Pike's book, inasmuch as it would be unthinkable that two men of affairs, defining the boundaries between two contiguous and not over-friendly countries, at the very time when they were negotiating the treaty in the east by which Spain ceded Florida to the United States in satisfaction of claims of the latter country, should not have been familiar with the books on the subject of their negotiations, especially when that book was well known and apparently popular at home and abroad. Within a year of its publication it was reprinted in England in 1812, a French translation was made, and it was also published in Dutch before the negotiations between the two countries.

In any event, Melish had drawn from Pike's account of the Red River in his map of 1818, which was used by the negotiators. The improved edition of his geography in 1823 followed Pike's description, and had the river rise near the Snow Mountains in the neighbourhood of Santa Fé, and located the entire stream in such a way that the boundary between the two countries could, as the treaty directed, follow the course of the river westwardly. In view of these circumstances, the decision would necessarily be for the United States, which claimed this as the boundary between it and Spain, to which Texas succeeded, rejecting the claim of Texas, inasmuch as the course of the line following the North Fork would be not westwardly but very markedly north-west.

In view of the intent of the parties, ascertained by documents then in existence, and the very map to which reference was made and confirmed by the subsequent maps of the region, it does not seem to be necessary to consider the contentions to break the force of their testimony, other than to say that the claim of Texas, that it had always contended for these boundaries, is met by the claim of the United

[1] *United States* v. *State of Texas* (162 U.S. 1, 59).

States that it had always likewise maintained the contention declared valid by the Supreme Court; that the acts of acquiescence, a doctrine recognized and applied in the cases of *Rhode Island* v. *Massachusetts* (12 Peters, 657), *Virginia* v. *Tennessee* (148 U.S. 503), *Indiana* v. *Kentucky* (136 U.S. 479), alleged by Texas, were negatived by the proof in denial thereof introduced by the United States and found by the court to be satisfactory; and that the trails from Santa Fé to the Mississippi, stated by Texas to follow more closely the North than the South Fork, whether before or after the treaty of 1819, were unimportant, inasmuch as the treaty made the course of the river, not the course of the trails, the boundary. Mentioning two further contentions on the part of Texas, Mr. Justice Harlan, on behalf of a unanimous court, thus concluded his opinion and announced its decree:

It is further said that the State, since it assumed to create Greer County, has expended a large amount of money in providing a public school system for the inhabitants of that locality. To what extent moneys have been so expended is not clearly shown. Whatever may be the facts, touching this point, we do not feel at liberty to give weight to them in this case. The question before us, we repeat, is one of law, and must be determined according to law. What may be fairly and justly demanded by the State, on account of moneys expended for the benefit of the inhabitants of the disputed territory, is a matter for the consideration of the legislative branch of the National Government.

In the argument it was suggested that this court ought not to forget how much was added to the power and wealth of this nation when Texas, with its imperial domain, came into the Union, and her people became a part of the political community for whom the Constitution of the United States was ordained and established. This fact cannot, of course, be forgotten by any American who takes pride in the prestige and greatness of the Republic. But the considerations which it suggests cannot affect the decision of legal questions, and must be addressed to another branch of the Government. The supposition is not to be indulged that that department of the Government will fail to recognize any duty imposed upon it by the circumstances arising out of this vexed controversy.

For the reasons stated the United States is entitled to the relief asked. And this court now renders the following decree:

Judgement for the United States.

This cause having been submitted upon the pleadings, proofs and exhibits, and the court being fully advised, it is ordered, adjudged and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the North Fork of Red River, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red River and of the river now known as the Prairie Dog Town Fork or South Fork of Red River until such line meets the 100th meridian of longitude—which territory is sometimes called Greer County—constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America. Each party will pay its own costs.[1]

42. State of Indiana v. State of Kentucky.

(163 U.S. 270) 1896.

In 1890 counsel for Indiana and Kentucky appeared before the bar of the court and argued the question of boundary, maintaining, on the part of Indiana, that the

[1] *United States* v. *State of Texas* (162 U.S. 1, 89–91).

southern boundary of that State extended farther to the south than counsel for Kentucky were willing to concede, who insisted that its jurisdiction, including the Ohio River, was with the channel of that river in 1792 when Kentucky, with definite boundaries, was admitted as a State of the Union, and that the subsequent change in its channel affected neither the boundary nor the jurisdiction of the State—a contention which met with the approval of the Supreme Court. In 1895 counsel for the two States besought the Supreme Court to appoint a commission to run the boundary line between the contending parties in the disputed territory north of the tract known as Green River Island, *Indiana* v. *Kentucky* (159 U.S. 275). The next year counsel for Indiana and Kentucky again appeared before the bar of the court to consider the report of the commissioners, Indiana moving to confirm it, Kentucky objecting to it in certain particulars. This is the present case (163 U.S. 270). The objections of Kentucky, however, were of a formal nature, and were not insisted upon. To understand them, however, and the work of the commission, composed of three persons recommended by the parties and appointed by the court, it is necessary to consider a small portion of the report.

Report of the commissioners presented (*vide* p. 303, *ante*).

A survey of the region in dispute was made by the Government of the United States in 1805 and 1806. A competent surveyor was employed by the commission to re-establish the line of that survey, which was done from the original notes of the survey. The surveyor employed by the commission made a map of the region, showing the result of his labours, including those of his predecessors, and presented a report to the commissioners, which, they say, satisfied them on the following three points :

The close accord of the reestablished meander line with the existing crest of the high bank was strong proof that the line as reestablished was in fact a very close approximation in location to the location of the line as originally run ; it also indicated that the original meander line was practically along the crest of the high water bank, and not along the low water line, and further, that the crest of the bank along the Indiana side of the depression as it exists to-day must be nearly as it was at the time of the original survey.[1]

Upon an examination of the testimony, the commissioners reached the conclusion that, given local conditions, ' the water of a low stage would have covered the middle half of the space between the crest and the high banks,' and that ' a fair allowance should be made for the space covered by the bank slopes extending from the Ohio banks to the low water line '.[2] They therefore decided to lay, as a trial line, ' a line parallel to the meander line of the survey of 1805 and 1806, as reëstablished, and at a distance of two chains from it, measured toward the island '.[3] Counsel for Indiana and Kentucky were invited ' to present in writing, if they so desired, any statements to prove that such line was not approximately the low water line in the year 1792 '.[4] Counsel on behalf of Kentucky stated at a meeting of the commissioners, to which counsel for both States were invited, that while he had no special objection to the test line tentatively adopted, although it did not seem to allow for accretions on the Indiana bank of the river between June 1, 1792 (when the State of Kentucky was admitted to the Union of the States), and the year 1806 (the date of the Congressional survey), he suggested and requested that the line finally adopted ' be

[1] *State of Indiana* v. *State of Kentucky* (163 U.S. 520, 523).
[2] *Ibid.* (163 U.S. 520, 523).
[3] *Ibid.* (163 U.S. 520, 524).
[4] *Ibid.* (163 U.S. 520, 524).

extended upon such course and for such distance . . . until it intersects the present low water line of the Ohio River both at the upper and lower ends '.[1] That is to say, to the points where the low-water mark of 1792 coincided with the low-water mark at the present time. After further consideration of the subject, the commissioners reported :

It was decided that your commissioners were not authorized to lay down any line beyond the upper and lower limits of Green River Island as it existed in 1792, and it was decided to adopt for recommendation the trial line within those limits as marked, with a slight change at the extreme upper end, to allow for what was undoubtedly a flat bank slope, it being upon a point.[2]

Placing posts at the initial and terminal points of the line, and at points where changes in direction occurred, the commissioners recommended the following procedure to mark the boundary line of 1792, re-established in 1895 :

Three suitable points should be selected upon the line, one near the upper end, one near the middle, and one near the lower end. At each of these points a monument should be erected which should consist of a stone of durable quality, six feet long, and eighteen inches square in cross section. This stone should be imbedded in a well made foundation of concrete. The concrete foundation to be six feet square and four feet deep, the upper surface being at the surface of the ground. The stone should be placed upright so as to extend three feet into the concrete, and have three feet above the gound. Upon one side of the stone should be cut the word ' Indiana ', and upon the opposite side the word ' Kentucky '. Between the stone monuments, at each turning point of the line, there should be placed an iron post six feet long, and six inches in diameter of cross section. The iron post to be imbedded in a foundation of concrete two feet square and three and one half feet deep ; the top of the concrete to be at the surface of the ground, and the post standing upright in the concrete, the top of the post being three feet above the gronud.

The estimated cost of the above described monuments, including placing the same, is $600.00.[3]

After consideration of the report and of the objections, the Court rendered the following decree, per Mr. Chief Justice Fuller :

Report confirmed by the Court.

It is ordered, adjudged, and decreed that the boundary line between said States of Indiana and Kentucky in controversy herein be, and it is hereby, established and declared to be as delineated and set forth in said report and the map accompanying the same and referred to therein, which map is hereby directed to be filed as a part of this decree.

It is further ordered, adjudged, and decreed that the said boundary line as described in said report and as delineated on said map, and now marked by cedar posts, be permanently marked as recommended in said report, with all convenient speed, and that said commission be continued for that purpose, and make report thereon to this court, and that this cause be retained until such report is made.

Costs to be shared equally.

It is further ordered, adjudged, and decreed that the compensation and expenses of the commissioners and the expenses attendant on the discharge of their duties, up to this time, be, and they are hereby, allowed at the sum of two thousand two hundred and thirty-six dollars and sixty cents in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged, and decreed that this decree is without prejudice to further proceedings as either of the parties may be advised for the

[1] *State of Indiana* v. *State of Kentucky* (163 U.S. 520, 528).
[2] *Ibid.* (163 U.S. 520, 524).
[3] *Ibid.* (163 U.S. 520, 527).

determination of such part of the boundary line between said States as may not have been settled by this decree under the pleadings of this case.

And it is further ordered, adjudged, and decreed that the clerk of this court do forthwith transmit to the chief magistrates of the States of Kentucky and Indiana copies of this decree duly authenticated under the seal of this court.[1]

The procedure followed in judicial settlement is very simple, very direct, very businesslike, very inexpensive, and where courts rule, forts bristling with cannon do not mark the boundaries between states.

43. State of Missouri v. State of Iowa.

(165 U.S. 118) 1897.

The fourth and final phase of the northern boundary dispute between Missouri and Iowa was decided by the Supreme Court in 1897 by the approval of the report of the commissioners appointed by the Court on February 3, 1896. The only dispute between the parties was as to some additional expenses incurred by one of the commissioners, which, however, were allowed by the court. The decree of the court approving the report of the commissioners, re-running and re-marking the line and establishing it as re-run and re-marked as the boundary line between the two States was announced, as in the previous case, by Mr. Chief Justice Fuller, speaking for his brethren, who said :

Commissioners' report confirmed.

And it is ordered, adjudged and decreed that the boundary line between said States of Missouri and Iowa in controversy herein be, and it is hereby, established and declared to be, as delineated and set forth in said report.

Costs to be shared equally.

It is further ordered, adjudged and decreed that the compensation and expenses of the commissioners and the expenditures attendant upon the discharge of their duties be, and they are hereby, allowed at the sum of five thousand two hundred and seventy-three dollars and fifty-six cents ($5,273.56), in accordance with their report as confirmed as aforesaid, and that said charges and expenses with the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged and decreed that the clerk of this court forthwith transmit to the Chief Magistrates of the States of Missouri and Iowa copies of this decree, duly authenticated under the seal of this court.[2]

44. State of Indiana v. State of Kentucky.

(167 U.S. 270) 1897.

It will be recalled that, in the third phase of the boundary dispute between Indiana and Kentucky (163 U.S. 520), the court directed the commissioners to draw the line in accordance with their report, presented to and approved by the court on that occasion. The court retained jurisdiction of the case in order that the final report of the commissioners should be presented and a final decree entered confirming the boundary line as drawn in the first report and as marked in the second, leaving the parties in litigation free, should they so desire, to move the court to have the entire boundary line drawn between the States. Counsel, however, did not move

[1] *State of Indiana* v. *State of Kentucky* (163 U.S. 520, 536–7).
[2] *State of Missouri* v. *State of Iowa* (163 U.S. 118, 144). See *ante*, p. 314.

to prolong the controversy in order to prolong the line. With their approval the court therefore approved the report of the commissioners and entered, per Mr. Chief Justice Fuller, the following final decision in this fourth and last phase of the boundary dispute between Indiana and Kentucky:

Final decree in the case.

It is ordered, adjudged and decreed that their said report this day filed be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the compensation of the commissioners and expenses attendant upon the discharge of their duties in permanently marking said line as directed by the decree of May 18, 1896, be, and the same are hereby, allowed the sum of one thousand one hundred and twenty-two dollars $1,122), in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged and decreed that the clerk of this court do forthwith transmit to the Chief Magistrates of the States of Kentucky and Indiana copies of this decree, duly authenticated, under the seal of this court.[1]

Comments on the preceding group of cases.

It will be observed that the cases included in this section have confirmed, if they have not enlarged, the jurisdiction previously exercised by the Supreme Court in pursuance of the express grant of jurisdiction in controversies between States of the Union and controversies to which the United States should be a party. The expression 'confirmed' is used advisedly, inasmuch as, in *United States* v. *North Carolina* (136 U.S. 211), the Supreme Court entertained, without discussion, and not merely with the consent, but at the request of counsel, a controversy between the United States, on the one hand, and North Carolina, one of these United States, on the other. The right to do so, however, unquestioned in that case, did not pass unchallenged, and in the leading case of *United States* v. *Texas* (143 U.S. 621), the Court of the States confirmed its action in accepting jurisdiction of and deciding a controversy between two States, one of which, as has been previously said, is admittedly sovereign and the other sovereign except for the exercise of the powers which it voluntarily renounced in behalf of all of the States of this more perfect Union.

The Supreme Court of the United States, therefore, is not only competent to decide controversies between States of the Union, but between the United States and States of the Union, whether the United States be plaintiff or whether the United States be a defendant. For in the former case it is presumed that the States of the Union, in the constitutional grant of power, gave a general consent to be sued, thus authorizing the United States to appear as a plaintiff, and by act of those States in Congress assembled gave consent that the instrument of their creation, namely, the United States, should be sued in the Court of Claims in certain categories of disputes by a person, including necessarily therein a State. Because of this special consent, the United States can be and has been summoned to the court as defendant and judgement for and against the United States has been affirmed by the Supreme Court, to which an appeal lies from the judgement of the Court of Claims: *United States* v. *State of Louisiana* (123 U.S. 32), *United States* v. *State of Louisiana* (127 U.S. 182), *State of Indiana* v. *United States* (148 U.S. 148), *United States* v. *State of New York* (160 U.S. 598). This more perfect Union of ours, worthy of consideration by the society of nations, which may not, however, desire such a close or perfect one, is indeed, in Chief Justice Marshall's telling phrase, a government of laws, not of men.

[1] *State of Indiana* v. *State of Kentucky* (167 U.S. 270, 274).

VIII.

DEEPENING CONFIDENCE OF THE STATES EXTENDS THE USEFULNESS OF THE COURT.

45. State of Louisiana v. State of Texas.

(176 U.S. 1) 1900.

A new group of cases.

With *Louisiana* v. *Texas* (176 U.S. 1), decided in 1900, a new group begins. It is therefore natural that the jurisdiction of the court should be questioned and that the first of the series should be taken up singly and solely with the question of jurisdiction. Although, in this first of a new series, the jurisdiction was denied —and it may therefore seem to be negative—a more thoughtful examination of the complaint shows that the court refused to entertain the bill, not because jurisdiction was lacking to accept it if properly framed, but because the bill in its form as presented did not set forth to the court facts that would justify the exercise of its jurisdiction, which Mr. Chief Justice Fuller, speaking for the court, was careful to analyse in the light of the origin of the court, and in the light of cases adjudged, to confirm. And notwithstanding the demurrer interposed by the State of Texas, the court really sustained it as to the bill, not as to the jurisdiction of the court.

As in the leading case of *Rhode Island* v. *Massachusetts* (12 Peters 657), the opinion of Mr. Justice Baldwin deals with the question of jurisdiction and the reasons for the creation of the court, so in this case of *Louisiana* v. *Texas*, the leading one of the new series, the opinion of the Chief Justice deals almost exclusively with the question of jurisdiction, the origin, nature, and functions of the court. The opening paragraph of the official report thus states the form in which the case was presented in 1899 to the Supreme Court :

> The State of Louisiana by her Governor applied to this court for leave to file a bill of complaint against the State of Texas, her Governor and her health officer. Argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs.[1]

The argument of counsel on behalf of Texas upon the motion of Louisiana for leave to file the bill was, if not irregular, contrary to the practice of the court, which presumes that a State does not file a bill for light or trivial reasons, much less for none at all, and, because of the dignity of the State, only allows objection to be made to the complaint after it has been filed, instead of on the motion to file. The procedure of the court is admirably stated in the little case of *State of Georgia* v. *Grant* (6 Wallace, 241), decided in 1867, in which Mr. Carpenter, then at the bar and later a Senator of the United States from Wisconsin, ' desired to know whether it would be regular for him to oppose this motion for leave if he should, on seeing and considering the bill desire to do so '. To this inquiry Mr. Chief Justice Chase, speaking for his brethren, replied :

> The court has adopted no rules governing suits in cases of original jurisdiction. In cases of equity, however, it has been the usual practice to hear a motion in behalf of the complainant for leave to file the bill, and, leave having been given, subsequent

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1).

proceedings have been regulated by orders made from time to time as occasion required. The motion for leave has been usually heard *ex parte*; except at the last term (1866), when leave was asked in behalf of the State of Mississippi to file a bill against the President of the United States.[1] Under the peculiar circumstances of that case it was thought proper that argument should be heard against the motion for leave. We perceive no reason for making such an exception in the case of the present motion.

The bill in the case of *Louisiana* v. *Texas* is really, as will be seen, in behalf of New Orleans 'one of the great commercial centres of this republic, and the second export city of this continent', not in behalf of the citizens of the State or of the State itself, and against certain officials of the State of Texas, namely, one Joseph D. Sayers, then the Governor, and William F. Blunt, then the health officer of the State of Texas, rather than against the State itself. It would have been proper had Louisiana appeared against the State or those officials in its own behalf or in behalf of its citizens as such, instead of appearing for New Orleans, which could not sue the State as the States did not give consent in the Constitution to be sued by cities; nor could the city of New Orleans have sued the officials of the State of Texas as such, because that would have been, according to direct decisions of the Supreme Court, a suit against the State of Texas; and the State itself, suing for New Orleans, could not do what New Orleans could not do, namely, sue the governor and the health officer of the State of Texas in behalf of the city, although the State of Louisiana could have sued the State of Texas as of right in case of a justiciable controversy existing between them.

Complaint that the Texas quarantine rules are an injury to the citizens of Louisiana.

The gravamen of the complaint filed by Louisiana, not merely at the instance but really for the benefit of New Orleans, which could not appear as suitor, was, as stated in the bill, that the State of Texas had granted by title XCII of its Revised Civil Statutes of the year 1895 to the Governor and health officer 'extensive powers over the establishment and maintenance of quarantines against infectious or contagious diseases, with authority to make rules and regulations for the detention of vessels, persons and property coming into the State from places infected, or deemed to be infected, with such diseases;' that Governor Sayers, in pursuance of this authority, issued a proclamation on the 1st day of March, 1899, 'establishing quarantine on the Gulf coast and Rio Grande border against all places, persons, or things coming from places infected by yellow fever, etc.'; that, on or about the 31st day of August, 1899, 'a case of yellow fever was officially declared to exist in the city of New Orleans, in a part of the city several miles away from the commercial part thereof, and from that time to this several other sporadic cases have been reported in similar parts of the city'; and that, because of this first case, William F. Blunt, Health Officer of the State of Texas, 'claiming to act under the provisions of Article 4324 of the Revised Civil Statutes, under the pretence of establishing a quarantine, placed an embargo on all interstate commerce between the city of New Orleans and the State of Texas . . . and to enforce these orders he immediately placed, and now maintains, armed guards, acting under the authority of the State of Texas, on all lines of travel from the State of Louisiana into the State of Texas, with instructions to enforce the embargo declared by him *vi et armis*, which instructions these armed guards are carrying out to the letter.[2]

Discrimination alleged.

The bill, while admitting the right of Texas to protect itself against infectious

[1] 4 Wallace, 475.

[2] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 3–4).

and contagious diseases, maintained that the regulations made for this purpose should be reasonable in that they should not discriminate between the commerce of a foreign State, or rather a State of the Union, in favour of the State itself and charged that the motive in the present case was largely, and the effect would be, to build up and to benefit the commerce of the City of Galveston and the State of Texas; that the action of the State of Texas by its Governor and health officer was an attempt to regulate interstate commerce, which they did not have the power to do, inasmuch as the regulation thereof was, by the Constitution of the United States, vested in the Congress. The bill then and there prayed a preliminary injunction enjoining the State of Texas, its Governor, its health officer and their successors in office and their subordinates, from taking the action complained of, and that such injunction be made perpetual on final hearing.[1]

Demurrer denying jurisdiction

To this bill of complaint Texas filed the following demurrer:

First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of said bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the States of Louisiana and Texas.

Second. Because the allegations of said bill show that the only issues presented by said bill arise between the State of Texas or her officers and certain persons in the city of New Orleans, in the State of Louisiana, who are engaged in interstate commerce, and which do not in any manner concern the State of Louisiana as a corporate body or State.

and alleging that the real plaintiffs are individuals.

Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the State of Louisiana, said State is in effect loaning its name to said individuals and is only a nominal party, the real parties at interest being said individuals in the said city of New Orleans who are engaged in interstate commerce.

Fourth. Because it appears from the face of said bill that the State of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said State possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose.

Fifth. Because it appears from the face of said bill that no property right of the State of Louisiana is in any manner affected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause.[2]

Judgement of the Court in favour of Texas.

On these pleadings, admitting the facts alleged in the complaint, inasmuch as a demurrer admits the facts, but, admitting them, maintains that they do not constitute a legal cause of action, the case was before the court; and its opinion was delivered by Mr. Chief Justice Fuller, for whom the reader will note, from cases already decided and others to be considered, suits between States seemed to have exercised a fascination. Fortunately for the reader, Mr. Chief Justice Fuller appears to have had uppermost in his mind the prestige of the tribunal of which he was the presiding member. To establish its jurisdiction upon a firm foundation and to extend it to other than boundary disputes, which have been so often before it and so carefully decided, he consulted the proceedings of the great conference of the American States in Philadelphia and delved into the pages of that greatest of modern books on political

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 11). [2] *Ibid.* (176 U.S. 1, 12–13).

science, Madison's *Notes* of that conference, in order to disclose the purpose of the court, the nature and the full extent of its jurisdiction, interposed as a mediator between diplomacy, which has failed, and war, which would otherwise follow such failure. Because of this investigation on the part of the Chief Justice, the case is of value not merely to the American lawyer, who may some day represent a State in controversy, but to the international lawyer who would fain see judicial settlement interposed between the breakdown of diplomacy and the outbreak of war.

History of the establishment of the Supreme Court, 1778–89.

After calling attention to the ninth of the Articles of Confederation of 1778, which authorized the creation of temporary commissions to decide finally and conclusively 'disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction, or any other cause whatever', and provided that 'all controversies concerning the private right of soil claimed under different grants of two or more States' 'should be decided in the same manner', the Chief Justice took up the proceedings of the conference of Philadelphia, in so far as they concerned the jurisdiction of the proposed court of the States in controversies between them. The second section of the 9th article of the proposed Constitution, for in the original draft the 9th article of the Constitution, reported on August 6th, and of the Confederation dealt with boundary disputes between the States, provided, as Mr. Chief Justice Fuller points out, that as to 'all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory', the Senate [instead of the Congress, under the Confederacy], should have power to designate a special tribunal to finally determine the same by its judgement; and by the third section 'all controversies concerning land claimed under different grants of two or more States' were to be similarly determined. The third section of the 11th article of the first draft of the Constitution provided, among other things, that the jurisdiction of the Supreme Court should extend 'to controversies between two or more States, except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States; and between a State, or citizens thereof, and foreign States, citizens or subjects'.[1]

By this method, there was to be a permanent tribunal for the decision of controversies other than those concerning boundaries, land grants under charters from different States, and a temporary tribunal, as under the 9th of the Articles of Con federation was to be formed for the disposition of the excluded categories whenever a difference of this kind should arise. The system of temporary commissions had not endeared itself to the statesmen of the early Republic, and to the matter-of-fact, also, it seemed inadvisable to provide for temporary tribunals when a permanent one was to be created. Therefore, John Rutledge, who had been Chairman of the Committee on Detail which drafted the Constitution, said, on the 24th of August, in respect of sections 2 and 3 of Article 9: 'This provision for deciding controversies between the States was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established.' Therefore the phrase 'except such as shall regard territory or jurisdiction' was omitted from the draft of the article conferring jurisdiction upon the Supreme Court, thus investing it with controversies of that kind, to give effect to Mr. Rutledge's contention, and the article was further

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 13–14).

amended by investing the court with jurisdiction of controversies between citizens of the same State claiming lands under grants of different States. Thus, by an exclusion and an addition, the permanent tribunal was clothed with the jurisdiction which the special tribunals were to have exercised under the proposed draft. After quoting the first and second clauses of the second section of Article 3 of the Constitution, as finally adopted, dealing with the judicial power, Mr. Chief Justice Fuller thus continues:

The reference we have made to the derivation of the words 'controversies between two or more States' manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over 'territory or jurisdiction'; for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.[1]

The Chief Justice here interpolates the word 'justiciable' as a restriction upon the power, a restriction not expressly contained in that document unless it be involved in the phrase 'judicial power'; and he re-enforces his view by a quotation from Mr. Justice Bradley, with which the reader is familiar, but which perhaps cannot be too often quoted in a work of this kind. Thus Mr. Chief Justice Fuller proceeded:

Undoubtedly, as remarked by Mr. Justice Bradley in *Hans* v. *Louisiana*, 134 U.S. 1, 15, the Constitution made some things 'justiciable, which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution.... The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which on the settled principles of public law are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 288, 289, and cases there cited.[2]

Mr. Chief Justice Fuller next refers to the Judiciary Act of 1789, organizing the judicial system of the United States and defining the powers of the different courts, and he quotes the language of the 13th section, carried forward as section 687 of the Revised Statutes, providing 'that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction.'[3] And in the following passage he carries the case a step further:

The language of the second clause of the second section of Article III, 'in all cases in which a State shall be a party,' means in all the enumerated cases in which a State shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. *California* v. *Southern Pacific Railroad Company*, 157 U.S. 229, 259; *United States* v. *Texas*, 143 U.S. 621. And by the Constitution and according to the statute, the original jurisdiction of this court is exclusive over

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 15).
[2] *Ibid.* (176 U.S. 1, 15).
[3] *Ibid.* (176 U.S. 1, 15).

suits between States, though not exclusive over those between a State and citizens of another State.[1]

It is natural that, in this connexion, the Chief Justice should refer to the 11th amendment, because the last clause of the passage quoted was an introduction to it ; and it was equally natural that he should refer to and quote from the opinion of his immediate predecessor, Mr. Chief Justice Waite, in the case of *New Hampshire* v. *Louisiana* (108 U.S. 76, 91), in which that distinguished lawyer and sound judge, discussing the 11th amendment said, in a case not wholly dissimilar from the one under consideration : The 11th amendment considered.

> The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be used, and in our opinion, one State cannot create a controversy with another State within the meaning of that term as used in the judicial clauses of the Constitution by assuming the prosecution of debts owing by other States to its citizens.[2]

Applying this doctrine to the case in hand, Mr. Chief Justice Fuller thereupon said :

> In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals.[3]

The Chief Justice here next points out a method of settling disputes which the States had renounced except with the consent of Congress, saying on this point, ' Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement '.[4] And, after quoting the language of Mr. Justice Field in the case of *Virginia* v. *Tennessee* (148 U.S. 503, 519), regarding compacts and agreements between the States, the necessity of the consent of Congress to their validity, which consent may be at the time or later, express or implied, he goes on :

> In the absence of agreement it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made ; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a State in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives.[5]

This is a passage which the international jurist may well ponder, for a court cannot act as a mentor, it can only decide controversies ; and in the case of the States the instance, as the Chief Justice said, must be rare when the States have not tried to reach an agreement through negotiation. The judge is not a substitute for the diplomat ; he steps in where the latter has failed, and disarms the soldier.

Mr. Chief Justice Fuller having laid down the principle that the case, to be entertained, must be justiciable, in the sense that the judicial power extends to it, and that it is capable of settlement in a court of justice, next declares that the State must have an interest in the controversy, invoking on this point the authority of

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 16).
[2] *Ibid.* (176 U.S. 1, 16).
[3] *Ibid.* (176 U.S. 1, 16).
[4] *Ibid.* (176 U.S. 1, 17).
[5] *Ibid.* (176 U.S. 1, 18).

South Carolina v. *Georgia* (93 U.S. 4, 14), in which the court dismissed the bill because no unlawful obstruction of navigation was proved, but expressly reserved the question, whether ' a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, and such as would enable a private person to maintain a similar action in another court '.[1] And thereupon the Chief Justice propounds the theory upon which the bill of Louisiana is based, and the absence of interest in the State itself, or rather the absence of injury to the States by virtue of which the State, in its corporate capacity, files the bill in its own behalf. Thus :

This case shows no injury to the State as such, but only to the citizens.

> Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens.
>
> She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but . . . because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained.[2]

The Texas quarantine law considered,

After having in general settled the question of jurisdiction, and having specified the conditions upon which the State might summon to the bar of the court another State of the Union, the Chief Justice turns to title XCII of the Revised Statutes of the State of Texas of 1895, empowering the Governor to issue a proclamation declaring a quarantine on the coast or elsewhere within the State, whenever it may be necessary in his judgement so to do, and for such length of time as in his judgement ' the safety and security of the people may require '.[3] The Governor was directed, by the statute, to appoint a skilled physician to be known as a health officer, who was to be familiar in practice with yellow fever, and upon the advice of such officer that the State is in danger of yellow fever or other infectious or contagious diseases, which could, in the opinion of the officer, be prevented by quarantine, the Governor should issue his proclamation establishing quarantine, directing the health officer to establish and enforce the restrictions imposed by the proclamation. Under such circumstances it is made the duty of the health officer to declare quarantine, and to maintain it until the Governor shall take such action as he may deem proper. The rules and regulations were to be prescribed by the Governor and health officer, stations were to be provided, competent physicians employed as health officers, persons and vessels to be detailed, provision made for the disinfection of vessels, their cargoes and passengers arriving at ports of Texas from infected ports and districts, and for rules and regulations regarding these matters, ' the object of such rules and regulations being to provide safety for the public health of the State without unnecessary restriction upon commerce and travel '.[4]

and held to be valid.

After quoting the provisions of the statute, the Chief Justice says that ' It is

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 18).
[2] *Ibid.* (176 U.S. 1, 19). [3] *Ibid.* (176 U.S. 1, 20). [4] *Ibid.* (176 U.S. 1, 20–1).

not charged that this statute is invalid nor could it be if tested by its terms '. Meeting the contention of Louisiana that the quarantine laws of Texas, amounting to an embargo, were a regulation of interstate commerce vested in the Congress of the United States, the Chief Justice stated that ' quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government '.[1] In support of this, for which no authority is needed, he aptly quotes a passage from the opinion of Mr. Justice Miller in *Morgan Steamship Company* v. *Louisiana Board of Health* (118 U.S. 455), decided in 1886 :

The matter is one in which the rules that should govern it may in many respects be different in different localities and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, one hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York.

Mr. Chief Justice Fuller next states the final contentions of Louisiana to be considered in this connexion, that the quarantine not only operates as an embargo, and that the rules and regulations issued to render it effective are more stringent than necessary, but also that the proclamation was issued, the rules and regulations framed and enforced ' with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans '.[2] On this allegation the Chief Justice thus comments and thus concludes the opinion of the court, which he had the honour to deliver on this occasion :

This is not a controversy between two States.

But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement, whose breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

In our judgment this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution.

Finally we are unable to hold that the bill may be maintained as presenting a case of controversy ' between a State and citizens of another State.'

Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would clearly lie with the State authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States, and such a controversy, as we have said, is not presented.[3]

Demurrer sustained and bill dismissed.

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 21).
[2] *Ibid.* (176 U.S. 1, 22).
[3] *Ibid.* (176 U.S. 1, 22–3).

Minority opinions.

It has been said that Mr. Chief Justice Fuller's opinion was the opinion of the court, but the court was not unanimous. Mr. Justice White, Mr. Chief Justice Fuller's illustrious successor, concurred in the result. Mr. Justice Harlan likewise concurred, but, differing from his learned chief, delivered a concurring opinion, as did also Mr. Justice Brown. In the course of Mr. Justice Harlan's opinion, he freely admitted the right of the State to issue police regulations. He asserted, however, in accordance with the opinions of the court in other cases, that this power was not unlimited, that an abuse of the power could be restrained in a court of justice. Taking the facts of the case as admitted, as on demurrer they must be, the State of Louisiana would, if Texas did not have the right to establish the quarantine and to issue the rules and regulations, be entitled 'under the Constitution, to have the validity of such regulations tested in a judicial tribunal' and in such a case the case should proceed and be tried upon its merits.[1] However, he was of the opinion that the State of Louisiana, 'in its sovereign or corporate capacity', could not bring a suit in the case made out in the bill, inasmuch as it did not involve the property interests of that State, that the State of Louisiana was not charged with the duty or power to regulate interstate commerce, as this power was vested in Congress, and that therefore a bill could be brought by the United States for this purpose, not by the State. So far the learned Justice concurs with his brethren. On two points he dissented, and as these are important they are laid before the reader in his own language :

I must express my inability to concur in that part of the opinion of the court relating to the clause of the Constitution extending the judicial power of the United States to controversies 'between a State and citizens of another State'. In reference to a controversy of that sort the court says that where none exist between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter confided to his discretion and judgment. But how can the Governor of a State be said to have an executive function to disregard the Constitution of the United States ? How can his State authorize him to do that ? It is one thing to compel the Governor of a State, by judicial order, to take affirmative action upon a designated subject. It is quite a different thing to say that being directly charged with the execution of a statute he may not be restrained by judicial orders from taking such action as he deems proper, even if what he is doing and proposes to do is forbidden by the supreme law of the land. His official character gives him no immunity from judicial authority exerted for the protection of the constitutional rights of others against his illegal action. He cannot be invested by his State with any discretion or judgment to violate the Constitution of the United States.

The court also says that it cannot accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would lie with the State authorities, and no refusal to fulfil their duty in that regard is set up; and that it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States. But the important question presented in this case—if the State of Louisiana in its sovereign capacity can sue at all in respect of the matters set out in the bill—is, whether the regulations being enforced by the health officer are in violation of the Constitution of the United States. The opinion of the court will be construed as meaning that even if Louisiana be entitled, in her sovereign capacity, to complain of those regulations, as repugnant to the Constitution of the United States, it could not proceed in this court against the defendant health officer, and that its

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 24).

only remedy is to appeal to the authorities of Texas, that is, to the Governor of that State, who has power to control his co-defendant, the health officer, and who has approved the regulations in question. I am not aware of any decision supporting this view. If the regulations in question are in violation of the Constitution of the United States, the defendant health officer, I submit, may, without any previous appeal to the Governor of Texas, be restrained from enforcing them, either at the suit of individuals injuriously affected by their being enforced, or at the suit of Louisiana in its corporate capacity, provided that State could sue at all in respect of such matters.

Although unable to assent to the grounds upon which the court rests its opinion, I concur in the judgment dismissing the suit solely upon the ground that the State of Louisiana in its sovereign or corporate capacity cannot sue on account of the matters set out in the bill.[1]

It will be observed, in the opinion of the Chief Justice and of Mr. Justice Harlan, the relations of the States under the Constitution are considered without reference to the relations of nations in the society of nations. The larger question was uppermost in the mind of Mr. Justice Brown, and he thus mentions it and draws the distinction in his brief but very important concurring opinion, which may perhaps, in view of the circumstances, better be considered as a dissent :

Mr. Justice Brown on the international aspects of the question.

I am not prepared to say that if the State of Texas had placed an embargo upon the entire commerce between Louisiana and Texas, the State of Louisiana would not be sufficiently representative of the great body of her citizens to maintain this bill.

In view of the solicitude which from time immemorial States have manifested for the interest of their own citizens ; of the fact that wars are frequently waged by States in vindication of individual rights, of which the last war with England, the opium war of 1840 between Great Britain and China, and the war which is now being carried on in South Africa between Great Britain and the Transvaal Republic, are all notable examples ; of the further fact that treaties are entered into for the protection of individual rights, that international tribunals are constantly being established for the settlement of rights of private parties, it would seem a strange anomaly if a State of this Union, which is prohibited by the Constitution from levying war upon another State, could not invoke the authority of this court by suit to raise an embargo which had been established by another State against its citizens and their property.

An embargo, though not an act of war, is frequently resorted to as preliminary to a declaration of war, and may be treated under certain circumstances as a sufficient *casus belli*. The case made by the bill is the extreme one of a total stoppage of all commerce between the most important city in Louisiana and the entire State of Texas ; and while I fully agree that resort cannot be had to this court to vindicate the rights of individual citizens, or any particular number of individuals, where a State has assumed to prohibit all kinds of commerce with the chief city of another State, I think her motive for doing so is the proper subject of judicial inquiry.

It is true that individual citizens, whose rights are seriously affected by a system of non-intercourse, might, perhaps, maintain a bill of this kind ; but to make the remedy effective it would be necessary to institute a multiplicity of suits, to carry on a litigation practically against a State in the courts of that State, and to assume the entire pecuniary burden of such litigation, when all the inhabitants of the complaining State are more or less interested in the result.

But the objection to the present bill is that it does not allege the stoppage of all commerce between the two States, but between the city of New Orleans and the State of Texas. The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant.[2]

[1] *State of Louisiana* v. *State of Texas* (176 U.S. 1, 25–7). [2] *Ibid.* (176 U.S. 1, 27–8).

Comments on the case.

The case of *South Carolina* v. *Georgia* (93 U.S. 4), decided in 1876, foreshadowed suits of the kind of *Louisiana* v. *Texas*, alleging that the action of the defendant State diverted the waters of a stream and obstructed navigation in which the plaintiff State had an equal right with the defendant. The offence charged was what would be called a nuisance in private law. That jurisdiction was not assumed in that case is of no importance, because, admitting jurisdiction, the court found that the facts set up did not constitute the nuisance complained of. In the same way, the refusal to entertain the bill in *Louisiana* v. *Texas* and to proceed to a judgement of the case upon its merits is of no importance, except as to the facts in the controversy. The important point is that the court stood ready to accept controversies of a justiciable nature, other than boundary disputes, whenever they should be presented in proper form. The question of principle was thus decided. The court was open and an invitation extended, as it were, to the States to invoke its aid in the settlement of their controversies.

That a State may not, on behalf of its citizen, sue a State of the Union is the express holding of the Supreme Court, laid down in the case of *New Hampshire* v. *Louisiana* (108 U.S. 76), and the doctrine in favour of Louisiana in this case was affirmed against its contention in *Louisiana* v. *Texas*. This may seem to the international jurist to be a sacrifice of the spirit to the letter of the law. The court is, however, to be commended, rather than criticized, for so doing, inasmuch as it showed itself the safe depository of a limited power ; and that, unlike other courts in this respect, it would consciously confine its jurisdiction within the limits of the power granted it, without impinging upon the sovereignty of the States of the Union, and without enlarging, or seeming to enlarge, the general consent which the States themselves had given to be sued. The practice of nations is otherwise, inasmuch as the nation appears for its citizen or subject, and by a special convention a State consents to be sued. It is not a general, it is therefore a particular consent, and, because of this fact, the commission or tribunal created is a special commission or tribunal, vested with jurisdiction conferred by the convention. A general consent in a general convention to be sued in a permanent court should be strictly construed, as otherwise a court of limited would become one of general jurisdiction and the agent assume the rôle of the master. The experience of the Supreme Court in this respect shows that a permanent tribunal may safely be entrusted with judicial power to interpret a general consent, without enlarging or seeking to enlarge the extent of the grant.

46. State of Tennessee v. State of Virginia.

(177 U.S. 501) 1900.

It will be recalled that, in the second of the cases of *Virginia* v. *Tennessee* (158 U.S. 267), decided in 1895, the Supreme Court refused a motion to have the boundary line between the States run and re-marked, as determined by compact of the States in 1803, inasmuch as the court, in the first of the cases, *Virginia* v. *Tennessee* (148 U.S. 503), had only decreed the re-marking of the boundary line, upon a showing made during that term of the court that marks for the identification of that line had been obliterated or had become indistinct. The motion in the second case, although

agreed to by the parties, that the entire line be run and re-marked, was rejected by the court, not merely because it was inconsistent with the decree, which could, at the request of the parties, be modified, but also because it was made at a subsequent term, when the court held that it had lost jurisdiction of the case. The right was nevertheless reserved to the parties to file an original bill to carry their agreement into effect should they desire to do so. This they did in the case of *Tennessee* v. *Virginia* (177 U.S. 501), decided in 1900, the State of Tennessee appearing this time as the complainant, by its Attorney-General, G. W. Pickle, with, however, the full knowledge and consent of the State of Virginia. The State of Tennessee filed its bill, setting forth the proceedings had in the two previous cases and their unsatisfactory ending, and asked that the State of Virginia be made a party defendant, that it be required to answer the bill, and that upon hearing a decree be entered ordering the re-running of the boundary line according to the compact of 1803, confirmed by the first decision of the Supreme Court in this controversy, *Virginia* v. *Tennessee* (148 U.S. 503). On the same 16th of April, 1900, the State of Virginia appeared by its Attorney-General, Andrew J. Montague, later its Governor and Representative in Congress, and filed an answer, fully accepting the decree of the court confirming the boundary between the States in accordance with the compact of 1803, and, concurring in the prayer of Tennessee, agreed that the line should be ascertained, re-located and re-marked by suitable and enduring monuments by commissioners appointed by the court, on the condition that they should not be residents of either of the contending States. On the following day the parties entered into the following stipulation :

Bill by consent to settle boundaries as drawn (*vide* p. 302, *ante*).

It is agreed by the parties to this cause as a basis for decree :

Terms of the agreement.

1. That the true boundary line between the States of Virginia and Tennessee is the compromise line established by proceedings had by the two States in 1801–1803, which was actually run and located at that time and marked with five chops in the shape of a diamond, and commonly called the diamond line, and running from White Top Mountain to Cumberland Gap.

2. That said line has in some parts of it, if not along its entire course, become so far obscured and uncertain as to embarrass the administration of the state and Federal laws and produce confusion as to rights of property and conflict and litigation between the citizens of the two States and to necessitate its ascertainment, re-running and re-marking.

3. That a decree be passed at once by this court providing for the ascertainment, re-tracing and re-marking of said line.

4. That the names W. C. Hodgkins, A. H. Buchanan and J. B. Baylor are suggested and agreed upon as satisfactory commissioners to be appointed by this court to ascertain, re-trace and re-mark said line.

5. That the record and opinion of the supreme court of Virginia in the case of *Miller* v. *Wills* shall not be considered as any part of the pleadings in this cause, and need not therefore be printed.

6. That whatever costs may be required to be borne by the said States shall be equally borne and divided between them.[1]

Decree granted as asked.

Thereupon Mr. Chief Justice Fuller, on behalf of the court, accepted the statements of the parties, that the line had become indistinct and that the boundary should be re-marked, directed that it should be done by the three commissioners recommended by the States, and then concluded as follows :

And it is further ordered that before entering upon the discharge of their duties,

[1] *State of Tennessee* v. *State of Virginia* (177 U.S. 501, 502).

each of the said commissioners shall be duly sworn to perform faithfully, impartially, without prejudice or bias, the duties herein imposed, said oath to be taken before the clerk of this court, or before either of the clerks of the Circuit Court of the United States for the States of Massachusetts, Virginia or Tennessee, and returned with their report ; that said commissioners may arrange for their organization, their meetings, and the particular manner of the performance of their duties ; and are authorized to adopt all ordinary and legitimate methods for the ascertainment of the true location of said boundary line, including the taking of evidence ; but in the event evidence is taken, the parties shall be notified and permitted to be present and examine and cross-examine the witnesses, and the rules of law as to admissibility and competency shall be observed ; and all evidence taken by the commissioners, and all exceptions thereto, and action thereon, shall be preserved and certified, and returned with their report.

And when the true location of said boundary line is ascertained, said commissioners shall cause such marks and monuments of a durable nature to be so placed on and along said line as to perpetuate it, and enable the citizens of each State, and others, to find it with reasonable diligence.

It is further ordered that the clerk of this court at once forward to the chief magistrate of each of said States, and to each of the commissioners designated by this decree, a copy of the decree duly authenticated, and that the commissioners proceed with all convenient speed to discharge their duty in ascertaining, re-tracing, re-marking and reëstablishing said line, as herein directed, and make their report thereof and of their proceedings in the premises to this court, on or before the first day of the next term thereof, together with a complete bill of costs and charges annexed.

And it is further ordered that, should vacancies occur in said board of commissioners, while the court is not in session, the Chief Justice is hereby authorized and empowered to appoint other commissioners, to supply the same, and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all costs of this proceeding, including remuneration not exceeding ten dollars per day for each commissioner, and the other costs incident to the ascertaining, re-tracing, re-marking and reëstablishing said line, shall be paid by the States of Tennessee and Virginia equally.[1]

47. State of Missouri v. State of Illinois.

(180 U.S. 208) 1901.

A dispute about the disposal of sewage.

The invitation which the Supreme Court in the case of *Louisiana* v. *Texas* (176 U.S. 1), decided in 1900, held out to the States to present all of their controversies of a justiciable nature, not only their boundary disputes, was first accepted by Missouri, which, in 1900, charged the State of Illinois and the Sanitary District of Chicago with the commission of an intolerable nuisance by emptying the sewage of that city into the Mississippi River, thus polluting the river as it flowed past the State of Missouri, to the great detriment of the people of that State and to the State itself.

To the bill containing these charges invoking the jurisdiction of the court, asking a writ of *subpoena* of the United States of America against the State of Illinois and a prayer for an injunction to restrain the commission of the acts whereof complaint

[1] *State of Tennessee* v. *State of Virginia* (177 U.S. 501, 503–4). For the final phase of this case see *State of Tennessee* v. *State of Virginia* (190 U.S. 64), *post*, p. 366.

was made, the State of Illinois demurred. The facts of the case as thus made out by the pleadings and demurred to on the ground of jurisdiction, was argued by counsel on November 12, 1900, and decided January 28, 1901, overruling the demurrers and allowing defendant to answer complainant's bill.

This is indeed a very short and summary statement of a very long and complicated case, but it is the case as made out by the parties. It is, however, advisable, for the sake of clearness, to enter somewhat into the details of the controversy. Counsel for Missouri stated in apt terms that the Mississippi River had, by act of Congress, been made the boundary between the two States ; that each had an equal use of its waters and exercised jurisdiction concurrently over them ; that the Illinois River empties into the Mississippi at a point above the city of St. Louis on the Illinois side of the river ; that its waters commingled with those of the Mississippi and flowed past the cities and towns of the complainant State ; that many thousands of its people were ' compelled to and do rely upon the waters of said river, in their regular, natural and accustomed flow, for their daily necessary supply of water for drinking and all other domestic and agricultural and manufacturing purposes ', and that, therefore, the river, in its ordinary course and natural flow, was of great value to the State of Missouri. The hand that penned this bill had evidently profited by the admonitions of the court in the case of *New Hampshire* v. *Louisiana* (108 U.S. 76), *South Carolina* v. *Georgia* (93 U.S. 4), and *Louisiana* v. *Texas* (176 U.S. 1).

Complaint that Illinois proposed to discharge sewage into the Mississippi.

The bill then stated the enactment of a law by the State of Illinois, known as the Sanitary District act, together with an act for the improvement of the Illinois and Des Plaines Rivers ; that pursuant to the first act the Sanitary District was incorporated, and in pursuance of the second act the rivers were improved so as to receive the sewage and drainage of the city of Chicago, which previously had been discharged into Lake Michigan, and to pass such sewage through their waters into the Mississippi at a point approximately forty-three miles to the north of the city of St. Louis. The bill further alleged that the sewage discharged amounted daily to about 1,500 tons, and that, if this immense mass of undefecated matter were drained into the waters of the Illinois and by them carried into the Mississippi, its waters would be polluted and rendered unfit for the purposes for which they previously had been used ; that the moneys expended in taking the waters from the river would be lost and that the people of the State would suffer greatly by this direct and continuing nuisance on the part of the State of Illinois.

The State of Missouri therefore appealed to the Supreme Court, in that it had no other remedy against the acts complained of, and invoked its equity jurisdiction as the remedy at law in damages would be inadequate, in that the complainant wished the State of Illinois to be restrained by a temporary injunction before the hearing, and by a permanent injunction thereafter from committing the acts complained of.

The mind that conceived the demurrers filed in this case was deeply versed in the decisions of the Supreme Court of the United States, and the hand that drafted them aptly incorporated the expressions of opinion that fell from the judges in the course of the cases, as appears from the seven causes of demurrer, thus assigned :

Demurrer of Illinois alleging

First. That this court has no jurisdiction of either the parties to, or of the subject-matter of, this suit, because it appears upon the face of said bill of complaint that the

that there is no controversy between the States.

matters complained of, as set forth therein, do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Missouri and the State of Illinois, or any of its citizens.

Second. That the matters alleged and set forth in said bill of complaint show that the only issues presented therein arise, if at all, between the State of Illinois and a public corporation created under the laws of said State, and certain cities and towns, in their corporate capacity as such, in the State of Missouri, and certain persons in said State of Missouri, residing on or near the banks of the Mississippi River, and which matters so stated in said bill of complaint, if true, do not concern the State of Missouri as a corporate body or State.

and that only individual interests are affected.

Third. That said bill of complaint shows upon its face that this suit is in fact for and on behalf of certain cities and towns in said State of Missouri, situated on the banks of the Mississippi River, and certain persons who reside in said State on or near the banks of said river; and that, although the said suit is attempted to be prosecuted for and in the name of the State of Missouri, said State is, in effect, loaning its name to said cities and towns and to said individuals, and is only a nominal party to said suit, and that the real parties in interest are the said cities and towns in their corporate capacity as such, and said private persons or citizens of said State.

Fourth. That it appears upon the face of said bill of complaint that the said State of Missouri, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of certain cities and towns in said State, in their corporate capacity as such, and of certain private citizens of said State, while under the Constitution of the United States and the laws enacted thereunder, the said State possesses no such sovereignty as empowers it to bring an original suit in this court for such purpose.

Fifth. That it appears upon the face of said bill of complaint that no property rights of the State of Missouri are in any manner affected by the matters alleged in said bill of complaint; nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

Sixth. That in order to authorize this court to maintain original jurisdiction of this suit as against the State of Illinois, or against any citizen of said State, it must appear that the controversy set forth in the bill of complaint and to be determined by this court, is a controversy arising directly between the State of Missouri and State of Illinois, or some of its citizens, and not a controversy in vindication of the alleged grievances of certain cities and towns in said State or of particular individuals residing therein.

Seventh. That said bill of complaint is in other respects uncertain, informal and insufficient, and that it does not state facts sufficient to entitle the said State of Missouri to the equitable relief prayed for in said bill of complaint.

Wherefore, for want of a sufficient bill of complaint in this behalf, the said defendants pray judgment; and that the said State of Missouri may be barred from having or maintaining the aforesaid action against said defendants, and that this court will not take further cognizance of this cause, and that the said defendants be hence dismissed with their costs.[1]

The pleadings have been somewhat fully stated, more fully, indeed, than necessary to the comprehension of the case, inasmuch as this suit may not improperly be regarded as a request of counsel for Missouri for a reconsideration of the opinion of the court in the case of *Louisiana* v. *Texas* (176 U.S. 1) and the substitution of Mr. Justice Brown's opinion for that of Mr. Chief Justice Fuller; and it may be noted in this connexion, and at the very beginning of the case, that from the opinion of the court, over-ruling the demurrer, the Chief Justice dissented. Mr. Justice Shiras, who delivered the opinion of the majority, for the Chief Justice and Justices Harlan

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 216–18).

and White dissented, evidently felt this ; for he, like Chief Justice Fuller in the Louisiana case, made a very careful and a much more thorough investigation than his chief of the origin, the nature and the extent of the jurisdiction of the Supreme Court and of its exercise in previous cases.

Judgement of the Court.

Indeed, Mr. Justice Shiras, who delivered the opinion of the court and of the majority of his brethren, laid bare the foundations of the court, disclosed its purposes, and established its jurisdiction in the light of its history and adjudged precedent. At the same time he stated the case made by the pleadings upon which the court would have to pass :

The questions thus presented are two : first, whether the allegations of the bill disclose the case of a controversy between the State of Missouri and the State of Illinois and a citizen thereof, within the meaning of the Constitution and statutes of the United States, which create and define the original jurisdiction of this court ; and, second, whether, if it be held that the allegations of the bill do present such a controversy, they are sufficient to entitle the State of Missouri to the equitable relief prayed for.

The question whether the acts of one State in seeking to promote the health and prosperity of its inhabitants by a system of public works, which endangers the health and prosperity of the inhabitants of another and adjacent State, would create a sufficient basis for a controversy, in the sense of the Constitution, would be readily answered in the affirmative if regard were to be had only to the language of that instrument.

Text of the Constitution.

' The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, . . . to controversies between two or more States, between a State and citizens of another State . . . In all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction.' Constitution, Article 3.

As there is no definition or description contained in the Constitution of the kind and nature of the controversies that should or might arise under these provisions, it might be supposed that, in all cases wherein one State should institute legal proceedings against another, the original jurisdiction of this court would attach.

But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration.[1]

The learned Justice thereupon examines the articles of Confederation, quoting in full the 9th of the Articles, providing for the appointment of special commissions to determine ' all disputes and differences now subsisting or that may hereafter arise, between two or more States, concerning boundary jurisdiction or any other cause whatever '. He next gives, in very considerable detail, the proceedings of the States in Philadelphia, whereby a permanent tribunal instead of a series of temporary ones was created and invested with the jurisdiction heretofore exercised by the Congress, in order to determine the disputes and differences which might arise between the States, even although the jurisdiction of this permanent tribunal might not include *all* disputes and differences ' concerning boundary jurisdiction or any other cause whatever '. These proceedings culminated in the third article of the Constitution

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 218–19).

concerning the judicial power, the second section whereof, so frequently quoted, extends the judicial power to controversies between the States of the more perfect Union. Mr. Justice Shiras, after concluding this portion of his opinion by quoting the 13th section of the Judiciary Act of 1789, with which the reader is likewise familiar, vesting the Supreme Court with exclusive jurisdiction of all controversies of a civil nature where the State is a party, except those between a State and its citizens or between a State and citizens of other States, or aliens, in which contingency it has original but not exclusive jurisdiction.

Precedents examined.

So much for the text. Now for its interpretation. As was to be expected from a Justice of the Supreme Court, he referred to the interpretation put upon the section of the Constitution by the Supreme Court in cases which it had been called upon to consider and to decide. After citing the case of *New York* v. *Connecticut* (4 Dallas, 1), decided in 1799, as the first exercise by the Supreme Court of its jurisdiction in a controversy between two States, and alluding to its holding that States could not properly be made parties in a dispute between two citizens of two different States concerning ownership of a strip of land situated in one of them ; and the case of *New Jersey* v. *New York* (5 Peters, 284), decided in 1831, in which Mr. Chief Justice Marshall stated on behalf of his brethren, upon the authority of adjudged cases, that the court could ' exercise its original jurisdiction in suits against a State ', the learned Justice took up the series of cases between Rhode Island and Massachusetts, which are as a text-book on judicial settlement. Only the comment of Mr. Justice Shiras may be quoted, as the reader has before him the views of the court in the whole series.

Before leaving this case it is to be remarked that the principal contest was as to whether a question of boundary, involving as it did the question of sovereignty over territory, was a judicial question of a civil nature. The implication was that the controversies between two or more States, in which jurisdiction had been granted by the Constitution, did not include questions of a political character. In some of the later cases the contention has been the very opposite ; that the intention of the Constitution was to apply to questions in which the sovereign and political powers of the respective States were in controversy.[1]

The learned Justice next takes up the case of *Florida* v. *Georgia* (11 Howard, 293), decided in 1850, in which leave was granted Florida to file its bill against Georgia in reference to a boundary dispute, and in addition leave was asked by the United States, and granted by the court, to be heard in its own behalf in the boundary dispute between the two States. Although the judges differed, no doubt was expressed, the learned Justice says, of the existence of the jurisdiction of the court over controversies between the States. His next reference is to the well-known case, or rather series of cases, of *Pennsylvania* v. *Wheeling & Belmont Bridge Company* (9 Howard, 647 ; 11 Howard, 528 ; 13 Howard, 518 ; 18 Howard, 421, 429), in which, to be sure, only one of the parties was a State, but in which it appeared for the protection of its rights and of its inhabitants against actions in an adjoining State injuriously affecting them. And as the authority in this case is so frequently invoked by the court, it is well for present purposes to lay before the reader the very brief yet adequate summary of it made by Mr. Justice Shiras :

Pennsylvania v. *Wheeling and Belmont Bridge Company* . . . was a case in equity, in which the State of Pennsylvania filed a bill against the Wheeling &

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 226).

Belmont Bridge Company, a corporation of Virginia, and certain contractors, charging that the defendants, under color of an act of the legislature of Virginia, were engaged in the construction of a bridge across the Ohio River at Wheeling, which would, as was alleged, obstruct its navigation to and from the ports of Pennsylvania, by steamboats and other crafts which navigated the same. Many different questions were discussed by counsel and considered by the court, respecting the nature and extent of the jurisdiction of this court, the right of the complainant State, whether at law or in equity, and the character of the decree which could be rendered. Several observations made in the opinion of the court will be hereafter adverted to when we come to consider the second ground of demurrer urged in the case before us. It is sufficient for our present purpose to say that the original jurisdiction of the court was sustained, a commissioner was appointed to take and report proofs, and a decree was entered declaring the bridge to be an obstruction of the free navigation of the river ; that thereby a special damage was occasioned to the plaintiff, for which there was not an adequate remedy at law, and directing that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.[1]

As was to be expected, the learned Justice refers to the case of *South Carolina* v. *Georgia* (93 U.S. 4), decided in 1876, in which South Carolina sought an injunction against Georgia, the Secretary of War, the Chief of Engineers of the United States Army, their agents and subordinates, 'from obstructing the navigation of the Savannah River, in violation of an alleged compact subsisting between the States of South Carolina and Georgia, and which had been entered into on April 24, 1787.' The reader will no doubt remember that the compact between the States concerning the navigation of the Savannah River was held to be abrogated by the Constitution, which vested the United States with the right to regulate commerce with foreign nations as among the States, and that, as Mr. Justice Shiras says, 'the acts complained of, being done in pursuance of congressional authority, and designed to improve navigation, could not be deemed an illegal obstruction, and accordingly the special injunction previously granted was dissolved and the bill dismissed.'[2] The court, however, had no doubt of its jurisdiction, and assumed it in that case to the extent of dismissing the bill and dissolving the injunction.

The next in the series of cases to which Mr. Justice Shiras refers is *Wisconsin* v. *Duluth* (96 U.S. 379), decided in 1878, in which it will be observed that, as in the Pennsylvanian case, when one State was a party, the court rendered a final decree, thus holding, in accordance with the Constitution, that the original jurisdiction of the court extended to a controversy between a State and the citizen of another State, because the city of Duluth is a corporation of the State of Minnesota and a corporation is a person, although an artificial one, and thus liable to suit. The diversion of the St. Louis River was the act complained of in this case, but it was for the improvement of Duluth and it was committed under an authority of a statute of Congress. For present purposes only a few sentences from Mr. Justice Miller's opinion may be quoted :

The counsel for defence deny that the State of Wisconsin has any such legal interest in the flow of the waters in their natural course as authorizes her to maintain a suit for their diversion. It is argued that this court can take cognizance of no question which concerns alone the rights of a State in her political or sovereign character. That to sustain the suit she must have some proprietary interest which is affected by the defendant. This question has been raised and discussed in almost

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 227). [2] *Ibid.* (180 U.S. 208, 227–8).

every case brought before us by a State, in virtue of the original jurisdiction of the court.

Mr. Justice Miller, without passing upon these questions, referred to the act of Congress as a sufficient defence to the bill, and, as Mr. Justice Shiras points out, 'The Court, therefore, did not decline jurisdiction, but exercised it, by inquiring into the facts put in issue by the bill and answer, and by dismissing the bill for want of equity.'[1]

The learned Justice next refers to the case of *Virginia* v. *West Virginia* (11 Wallace, 39), decided in 1870, in which the question of jurisdiction of the court in a boundary dispute was raised. After referring to the decision of *Rhode Island* v. *Massachusetts* (12 Peters, 651), *Missouri* v. *Iowa* (7 Howard, 660), *Florida* v. *Georgia* (17 Howard, 478), and *Alabama* v. *Georgia* (23 Howard, 505), Mr. Justice Miller, who likewise delivered the opinion in this case as in the previous one of *Wisconsin* v. *Duluth*, thereupon said:

> We consider, therefore, the established doctrine of this court to be that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts and agreements between those States, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding.[2]

The jurisdiction of the court is so settled in cases of this kind, that a citation of authority in support of it almost smacks of pedantry, but it was necessary for the purpose which Mr. Justice Shiras had in mind, to establish the jurisdiction of the court in practice as well as in theory, and then, having done so, to test its extent by adjudged cases, or rather, to decide whether the present case would fall within that jurisdiction, without, however, attempting to define the jurisdiction in general, which might tend to restrict it.

The first case in the nature of a limitation to which he refers is that of *New Hampshire* v. *Louisiana* (108 U.S. 76), decided in 1883, in which the Supreme Court held that a State could not, after the 11th amendment, appear for its citizen without violating the spirit if not the letter of that amendment, leaving unquestioned the right of the State to appear in its own behalf, as later happened in the case of *South Dakota* v. *North Carolina* (192 U.S. 286), decided in 1904, where the State owned the bonds, which, in the case of *New Hampshire* v. *Louisiana*, were owned by the citizen.

In further illustration of the limitation of the jurisdiction of the court, Mr. Justice Shiras refers to the case of *Wisconsin* v. *Pelican Insurance Company* (127 U.S. 265, 286), in which the defendant was a corporation of the State of Louisiana, thus giving the court jurisdiction, which, however, it refused to exercise, because the action was criminal, not civil, in its nature, as required by the 13th section of the Judiciary Act of 1789. On this point Mr. Justice Gray, speaking for the court in that case, said:

> The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. . . . From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 229). [2] *Ibid.* (180 U.S. 208, 231).

this court over controversies between a State and citizens of another State, or of a foreign country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. . . . The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. . . . This court, therefore, cannot entertain an original action to compel the defendant to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine.

And before taking up the last case of the series, Mr. Justice Shiras quoted what may be called the classic passage from the opinion of Mr. Justice Bradley in the case of *Hans* v. *Louisiana* (134 U.S. 1), to the effect that the framers of the Constitution defined the judicial power in the sense in which it was then understood in England and in the United States, making, however, 'some things . . . justiciable which were not known as such at the common law.' This last case is naturally that of *Louisiana* v. *Texas* (176 U.S. 1), which is not only on all fours with that of *Missouri* v. *Illinois*, but which was being reconsidered, if it could not be said to be before the court upon appeal.

The learned Justice took pains to detail with considerable fullness both the facts and the pleadings, but as the case, in all its essentials, is fresh in the mind of the reader, there is no need to dwell upon it. Therefore the conclusion reached by Mr. Justice Shiras, drawn from an examination of the origin and nature of the Constitution and the precedents of the court may be stated without further introduction in his own language. Thus :

From the language of the Constitution, and from the cases in which that language has been considered, what principles may be derived as to the nature and extent of the original jurisdiction of this court in controversies between two or more States ?

From the language, alone considered, it might be concluded that whenever, and in all cases where one State may choose to make complaint against another, no matter whether the subject of complaint arises from the legislation of the defendant State, or from acts of its officers and agents, and no matter whether the nature of the injury complained of is to affect the property rights or the sovereign powers of the complaining State, or to affect the rights of its citizens, the jurisdiction of this court would attach.[1]

But this is, in the opinion of the learned Justice, an overstatement of an admitted jurisdiction, although the language of the Chief Justice in the case of *Cohens* v. *Virginia* (6 Wheaton, 264, 392), decided in 1821, seems to justify it, for in that leading case that great judge said, speaking of the suits to which a State is a party :

In one description of cases the jurisdiction of the court is founded entirely on the character of the parties ; and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases arising under the Constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 238–9).

the first class those cases in which jurisdiction is given, because a State is a party; and to include in the second those in which jurisdiction is given, because the case arises under the Constitution or law.

Such may have been the design of the framers of that instrument, as they were intent on eliminating diplomacy on the one hand and war on the other in the relations of the States, and upon devising a substitute for either or both, not merely in the interest of the States in their relation to the outer world but in the interest of domestic tranquillity in their relations one with another. Perhaps the language of the great Chief Justice would have stood unquestioned in theory and been followed in practice had it not been for the 11th amendment, which protected a State from suit by an individual, and the determination of the court to prevent indirectly what the amendment had forbidden in direct terms, by permitting an individual to have the State appear in his behalf where he might have sued but for the amendment. But speculation is futile in face of the fact, and the learned Justice has thus stated the fact:

But it must be conceded that upon further consideration, in cases arising under different states of facts, the general language used in *Cohens* v. *Virginia*, has been, to some extent, modified. Thus, in the cases of *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, *ut supra*, jurisdiction was denied to this court where the cause of action belonged to private persons, who were endeavoring to use the name of one State to enforce their rights of action against another. Though, perhaps, it may be said that jurisdiction was really entertained, and that the bills were dismissed, because the court found that, under the pleadings and testimony, the States complainant had no interest of any kind in the proceedings.

So, too, in *Wisconsin* v. *Pelican Insurance Company*, *ut supra*, the court held that, notwithstanding the action was brought by a State against the citizens of another State and was thus within the letter of the Constitution, yet that the court had a right to inquire into the nature of the case, and, when it found that the object of the suit was to enforce the penal laws of one State against a citizen of another, to refuse to exercise jurisdiction.

Louisiana v. *Texas* (*ante*, p. 334) distinguished.

In the case of *Louisiana* v. *Texas*, *ut supra*, the bill was dismissed because a controversy between the two States was not actually presented; that what was complained of was not any action of the State of Texas, but the alleged unauthorized conduct of its health officer, acting with a malevolent purpose against the city of New Orleans. Here again it may be observed that the court did not decline jurisdiction, but exercised it in holding that the facts alleged in the bill did not justify the court in granting the relief prayed for.[1]

This, it would seem, is returning with the left what the right hand had taken away, and is in reality a confirmation of Chief Justice Marshall's views; for the court did not decline the jurisdiction, whose existence he asserted, but refused, because of the facts of the case, to exercise the jurisdiction which the court was held to possess. But, however that may be, Mr. Justice Shiras reaches the conclusion, as the result of a very exhaustive, searching, and interesting examination, that the exercise of jurisdiction in cases hitherto brought and adjudged does not exhaust the jurisdiction which he finds the court to possess and the possibility of its beneficent exercise. For he says, in what may be regarded as his final word in these preliminary matters before taking up the case before him:

The cases summarized.

The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 240).

affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy ; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.[1]

Mr. Justice Shiras now comes to the case of *Missouri* v. *Illinois* as made out by the pleadings, and his careful statement of the purposes of the court and his detailed analysis of the causes was to establish once and for all the jurisdiction of this Supreme Court of the States in the class of cases of which *Louisiana* v. *Texas* and *Missouri* v. *Illinois* might be taken as types, and indeed in other cases in which States of the more perfect Union might be interested. Coming to the case in hand, he had no doubt as to the jurisdiction of the court, saying in the very opening sentence of this part of his opinion :

No other remedy available in this case.

An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.[2]

To make good his statement, he analyses briefly the grievances whereof Missouri complained, before taking up the objections primarily made and earnestly urged by Illinois :

General interest of Missouri in the bill.

The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.[3]

Taking up the objections of Illinois he first says :

It can scarcely be supposed, in view of the express provisions of the Constitution and of the cited cases, that it is claimed that the State of Illinois is exempt from suit because she is a sovereign State which has not consented to be sued.[4]

The contention of the State of Illinois appeared to be that the suit was really against the Sanitary District, that the State of Illinois was improperly a party, and this objection was untenable because of the line of precedents, of which *Pennsylvania* v. *Wheeling Bridge Company, supra,* is the type, recognized the Supreme Court as possessing original jurisdiction of a suit by a State against a corporation of another State.

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 240–1).
[2] *Ibid.* (180 U.S. 208, 241). [3] *Ibid.* (180 U.S. 208, 241). [4] *Ibid.* (180 U.S. 208, 242).

The action complained of is State action.

But the learned Justice was unwilling to dispose of the case on this ground, as the Sanitary District was a corporation created by and was an agent of the State, and therefore it was the State in the exercise of the power with which it was vested, apparently acting within, not in excess, of its power. 'It is', said the learned Justice, 'state action, and its results that are complained of—thus distinguishing this case from that of *Louisiana* v. *Texas*, where the acts sought to be restrained were alleged to be those of officers or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.' 'The object of the bill', he continued, 'is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant.' [1]

Demurrer to the allegations considered.

Having disposed of what may be called the formal objections to Missouri's complaint, Mr. Justice Shiras next turns his attention to the allegations stated by Missouri, which on demurrer are to be taken as facts, and which Illinois contended were not sufficient to grant the relief prayed for admitting them to be true. On this phase of the subject, which really was all that the court had to consider, as jurisdiction in law and jurisdiction in fact were alone involved, Mr. Justice Shiras said, and in so saying practically disposed of the case :

> This proposition is sought to be maintained by several considerations. In the first place, it is urged that the drawing, by artificial means, of the sewage of the city of Chicago into the Mississippi River may or may not become a nuisance to the inhabitants, cities and towns of Missouri ; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?
>
> The bill charges that the acts of the defendants, if not restrained, will result in the transportation, by artificial means and through an unnatural channel, of large quantities of undefecated sewage daily, and of accumulated deposits in the harbor of Chicago and in the bed of the Illinois River, which will poison the water supply of the inhabitants of Missouri and injuriously affect that portion of the bed or soil of the Mississippi River which lies within its territory.
>
> In such a state of facts, admitted by the demurrer to be true, we do not feel it necessary to enter at large into a discussion of this part of the defendants' contention, but think it sufficient to cite one or two authorities.[2]

Precedents examined.

After citing in support of his views and the views of the court the following cases, *Attorney General* v. *Jamaica Pond Aqueduct Corporation* (133 Massachusetts, 361), *Mugler* v. *Kansas* (123 U.S. 623, 673), *Coosaw Mining Co.* v. *South Carolina* (144 U.S. 550), *Goldsmid* v. *Tunbridge Wells Commissioners* (L. R. 1 Equity, 161), and *Chapman* v. *Rochester* (110 New York, 273), the learned Justice thus continued and concluded :

> The bill in this case does not assail the drainage canal as an unlawful structure, nor aim to prevent its use as a waterway. What is sought is relief against the pouring

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 242). [2] *Ibid.* (180 U.S. 208, 242–3).

of sewage and filth through it, by artificial arrangements, into the Mississippi River, to the detriment of the State of Missouri and her inhabitants, and the acts are not merely those that have been done, or which when done cease to operate, but acts contemplated as continually repeated from day to day. The relief prayed for is against not merely the creation of a nuisance but against its maintenance.

Our conclusion, therefore, is that the demurrers filed by the respective defendants cannot be sustained. We do not wish to be understood as holding that, in a case like the present one, where the injuries complained of grow out of the prosecution of a public work, authorized by law, a court of equity ought to interpose by way of preliminary or interlocutory injunction, when it is denied by answer that there is any reasonable foundation for the charges contained in the bill. We are dealing with the case of a bill alleging, in explicit terms, that damage and irreparable injury will naturally and necessarily be occasioned by acts of the defendants, and where the defendants have chosen to have their rights disposed of, so far as the present hearing is concerned, upon the assertions of this bill.

We fully agree with the contention of defendants' counsel that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which is apprehended will create a nuisance of which its complainant may complain, the proofs must show such a state of facts as will manifest the danger to be real and immediate. But such observations are not relevant to the case as it is now before us.

The demurrers are overruled, and leave is given to the defendants to file answers to the bill.[1]

Demurrers overruled.

The opinion of Mr. Justice Shiras was not, as has been stated on more than one occasion, the unanimous opinion of the court. Three of the members dissented. For the dissent of Mr. Chief Justice Fuller, in which Mr. Justice Harlan and Mr. Justice White concurred, there is much to be said; and it was thus said by Mr. Chief Justice Fuller:

Dissenting opinion.

Controversies between the States of this Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction, which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences, can be invoked, it must appear that the States are in direct antagonism as States. Clearly this bill makes out no such state of case.

If, however, on the case presented, it was competent for Missouri to implead the State of Illinois, the only ground on which it can be rested is to be found in the allegation that its Governor was about to authorize the water to be turned into the drainage channel.

The Sanitary District was created by an act of the General Assembly of Illinois, and the only authority of the State having any control and supervision over the channel is that corporation. Any other control or supervision lies with the law-making power of the State of Illinois, and I cannot suppose that complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which would bind the State of Illinois or control its action.

The Governor, it is true, was empowered by the act to authorize the water to be let into the channel on the receipt of a certificate, by commissioners appointed by him to inspect the work, that the channel was of the capacity and character required. This was done, and the water was let in on the day when the application was made to this court for leave to file the bill. The Governor had discharged his duty, and no official act of Illinois, as such, remained to be performed.

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 248–9)

Assuming that a bill could be maintained against the Sanitary District in a proper case, I cannot agree that the State of Illinois would be a necessary or proper party, or that this bill can be maintained against the corporation as the case stands.

The act complained of is not a nuisance, *per se*, and the injury alleged to be threatened is contingent. As the channel has been in operation for a year, it is probable that the supposed basis of complaint can now be tested. But it does not follow that the bill in its present shape should be retained.

In my opinion both the demurrers should be sustained, and the bill dismissed, without prejudice to a further application, as against the Sanitary District, if authorized by the State of Missouri.[1]

48. State of Kansas v. State of Colorado.

(185 U.S. 125) 1902.

As often happens in controversies between the States of the Union, there are what may be called two phases, the first of which relates to the pleadings, the second to the merits. So in the controversy between Kansas and Colorado there are two phases, the first dealing with the pleadings, with the usual denial of jurisdiction of the court to entertain the suit, and the further denial that the facts stated in the complaint constitute a cause of action. It is well to note the pertinacity with which the defendant contests every assertion of jurisdiction, so that the assumption of jurisdiction is over the protest of the defendant, thus affording an additional guarantee that the jurisdiction of the court is not extended beyond the letter, much less the spirit, of the Constitution.

With this first phase the first case of *Kansas* v. *Colorado* (185 U.S. 125), decided in 1902, deals, and, as in the majority of instances since the question of jurisdiction was settled in the great and leading case of *Rhode Island* v. *Massachusetts* (12 Peters, 657), the demurrer to the jurisdiction of the court and the sufficiency of the facts was overruled. The case in hand is no exception. The facts of the case, however, make of it an interesting and memorable controversy, capable of supplying at once a rule and a precedent for an international court when established, and likewise cited as an authority in the second phase of *Missouri* v. *Illinois* (200 U.S. 496), shortly to be considered.

The second and final phase of the controversy, *Kansas* v. *Colorado* (206 U.S. 46), decided in 1907, is interesting not only as the decision of the case upon its merits, but in that the United States intervenes, no longer hesitatingly, but with the confidence of one flushed with pride and conscious power, claiming an interest in the controversy, and confident of its right to be heard and to be considered in the decision—which, however, it may be said in passing, was contrary to all of its contentions, showing again that a court of limited jurisdiction may be trusted to interpret the Constitution or convention creating it without bending the knee to a majestic or imperial litigant. And the case is of further interest in that it attempts to lay down a rule and a standard, applicable to the claim and the conduct of every nation bordering upon a river flowing through more than one country in its descent to the sea.

By leave of the court the State of Kansas filed its bill of complaint against the State of Colorado on May 20, 1901, stating what would not ordinarily be stated in

[1] *State of Missouri* v. *State of Illinois* (180 U.S. 208, 249–50). For the succeeding phase of this case see *State of Missouri* v. *State of Illinois* (200 U.S. 496), *post*, p. 405.

this connexion, that the plaintiff was admitted into the Union January 29, 1861, and Colorado August 1, 1876, inasmuch as these facts were known to the court, which is held to have judicial notice of them. They are important, however, in that Kansas claimed certain rights to the waters of the Arkansas River, flowing through its territory, which were secured to it, according to its contention, by the common law before Colorado became a State and sought, according to a narrow and different principle of law, to appropriate to the purposes of irrigation the waters of the Arkansas before it entered the State of Kansas. This is, briefly stated, the case and the cause of the controversy; but for its correct understanding it is necessary to go somewhat into detail.

A dispute about the use of the Arkansas River.

The complaint sets forth the cause of action with great fullness, stating that the Arkansas River rises in the Rocky Mountains in the State of Colorado; that it flows through certain counties of that State and thence into the State of Kansas; that its tributaries have their rise and entire flow in that State; that the length of the river within the State is approximately 280 miles, and the river and its tributaries drain approximately 22,000 square miles; that this entire area is east of and largely in the Rocky Mountains, where the accumulation of snow in the winter is very great, and the waters formed from the melting of the snow flow into the river directly and in great volume, from early in the Spring until August; that the river 'is a navigable stream under the laws and departmental rules and regulations of the United States'; that the volume of water in the bed of the river, flowing into Kansas, was, would and should be very great but for the wrongful diversion thereof by the authorities of the State of Colorado.

Complaint of Kansas that Colorado diverts the water,

So much for Colorado. The bill next states that the length of the river in Kansas is about 310 miles; that in the latter State it flows through a broad valley, and that along its entire length in the State there are alluvial deposits of great depth, amounting in the aggregate to about 2,500,000 acres, lying for the most part in the western part of the State; that in this part of the State the rainfall is very light, and by reason of the porous nature of the soil throughout that area the greater portion of the water so falling sinks into the earth, so that only a small portion thereof finds its way into the river; that the water flowing in the bed of the river, as it passes through the State of Kansas, flows under the surface, hence called the underflow, and fertilizes the land of the valley, rendering it productive, which would not be the case if the State of Colorado could divert the waters from the river before it reaches the State of Kansas; and that the diversion of the waters by Colorado for the purposes of irrigation had already greatly decreased the flow, and, in consequence, the productivity of the lands depending upon the river was decreased and their value lessened.

thus impairing the fertility of Kansas,

The bill alleged ownership, vested in the State, of some 126 acres watered by the river, granted by the Congress of the United States to be used for a soldiers' home in accordance with the terms of the act of March 2, 1889; and the complaint further alleged that, since 1885, the State had been the owner of some 640 acres, used for purposes of an industrial reformatory, and dependent upon the waters of the Arkansas, and that the State's grantor had acquired title to those lands in 1873, so that, to quote the language of the bill, evidently drawn with reference to the holding of the Supreme Court in the case of *Louisiana* v. *Texas*, 'the State of

including land the property of the State.

Kansas is entitled to the full natural flow of the water of the Arkansas River, in its accustomed place and at its normal height, and in its natural volume underneath all of the said reformatory lands.'

After averring that, by the Constitution of the State of Colorado, the water of every natural stream not heretofore appropriated was declared to be the property of the public and dedicated to the uses of the people of the State, and that the right to divert unappropriated waters of any natural stream for beneficial uses should never be denied,[1] the bill stated that, under authorization of the legislature of Colorado, and for the purposes of irrigating arid and waste lands for agricultural purposes, vast canals, ditches, and reservoirs had been constructed to withdraw and to hold for such purposes the waters of the river, to such an extent that, to quote the language of the bill, ' no water flows in the bed of said river from the State of Colorado into the State of Kansas during the annual growing season, and the underflow of said river in Kansas is diminishing and continuing to diminish, and if said diversion continues to increase, the bottom lands of said valley will be injured to an enormous extent, and a large portion thereof will be utterly ruined and will become deserted and be a part of the arid desert.'[2] And the bill specifically charges that ' it is the intention of the State of Colorado to divert absolutely all of the water that does, can or might flow down the Arkansas River into the State of Kansas, so that all of the water shall be used in the State of Colorado, and none whatever, either above or below the surface, that may by any possibility be utilized, shall cross the line into the State of Kansas, all to the great profit and advantage of the State of Colorado ; and to the great damage and injury of the State of Kansas '.

On these facts as thus stated the bill prayed not only for general relief but for the following specific relief :

Relief claimed by the bill.

That a decree may be entered prohibiting, enjoining and restraining the State of Colorado from granting, issuing, or permitting to be granted or issued hereafter, any charter, license, permit or authority to any person, firm or corporation for the diversion of any of the waters of the Arkansas River or of any of its tributaries from their natural beds, courses and channels within the State of Colorado, except for domestic use ; and from granting to any person, firm or corporation any right to extend or enlarge any of the canals or ditches, now existing ; or to construct and operate any other canals, ditches, branches, laterals or reservoirs in addition to those heretofore constructed and now in use in said State.

That the State of Colorado may be prohibited, enjoined, and restrained, as a State, from itself constructing, owning or operating, either directly or indirectly, any canal or ditch whereby the waters of said river, or any of its tributaries, shall be diverted from their natural courses and channels ; and from constructing, owning, operating or using any reservoir for the storage of the waters of said river, or any of its tributaries, for purposes of irrigation.

[1] Sect. 5. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the uses of the people of the State subject to appropriation as hereinafter provided.

Sect. 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose ; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purpose shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. *State of Kansas* v. *State of Colorado* (185 U.S. 125, 132–3).

[2] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 133).

That the said State of Colorado may be prohibited, enjoined and restrained from granting to any person, firm or corporation any extension of any charter, license, permit, or authority, of any kind or nature whatsoever, for the diversion of any of said waters from said river or its tributaries for irrigation purposes, or for the continuance of such diversions thereof after the charter, license, permit or authority theretofore granted for that purpose shall have expired.[1]

This is a formidable charge and a formidable prayer. To the charge and the prayer the State of Colorado thus demurred on October 15, 1901.

Demurrer of Colorado,

First. That this court has no jurisdiction of either the parties to or the subject matter of this suit because it appears on the face of said bill of complaint that the matters set forth therein do not constitute, within the meaning of the Constitution of the United States, any controversy between the State of Kansas and the State of Colorado.

denying the jurisdiction,

Second. Because the allegations of said bill show that the issues presented by said bill arise, if at all, between the State of Kansas and certain private corporations and certain persons in the State of Colorado who are not made parties herein and which matters so stated, if true, do not concern the State of Colorado as a corporate body or State.

asserting that the suit is really between private parties,

Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals who reside in the said State of Kansas on the banks of the Arkansas River and that although the said suit is attempted to be prosecuted for and in the name of the State of Kansas, said State is in fact loaning its name to said individuals and is only a nominal party to said suit and that the real parties in interest are the said private parties and persons residing in said State.

Fourth. Because it appears from the face of said bill that the State of Kansas in her right of sovereignty is seeking to maintain this suit for the redress of the supposed wrongs of certain private citizens of said State while under the Constitution of the United States and the laws enacted thereunder, said State possesses no such sovereignty as empowers it to bring an original suit in this court for such purposes.

Fifth. Because it appears upon the face of said bill of complaint that no property rights of the State of Kansas are in any manner affected by the matters alleged in said bill of complaint ; nor is there any such property right involved in this suit as would give this court original jurisdiction of this cause.

denying that any property right of Kansas is infringed.

Sixth. Because it appears from the face of said bill of complaint that the acts complained of are not done by the State of Colorado or under its authority, but by certain private corporations and individuals against whom relief is sought and who are not made parties herein.

Seventh. The bill is multifarious in this, to wit ; that thereby the State of Kansas seeks to determine the claims of the State of Kansas as a riparian owner against the claims of the State of Colorado as an appropriator of water ; the claims of the State of Kansas as a riparian owner against the separate and several claims of numerous undisclosed Colorado appropriators of water ; the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the claims of the State of Colorado as an appropriator of water ; and the separate and severable claims of various disclosed and undisclosed riparian claimants in Kansas against the separate and severable claims of numerous undisclosed Colorado appropriators ; and otherwise, as is apparent from the bill.

alleging that the bill is multifarious,

Eighth. Because the acts and injuries complained of consist of the exercise of rights and the appropriation of water upon the national domain in conformity with and by virtue of divers acts of Congress in relation thereto.

and claiming the authority of Congress.

Ninth. Because the constitution of the State of Colorado declaring public property in the waters of its natural streams and sanctioning the right of appropria-

[1] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 137).

tion was enacted pursuant to national authority and ratified thereby at the time of admission of the State into the Union.

Tenth. Said bill of complaint is in other respects uncertain, informal and insufficient and does not state facts sufficient to entitle the State of Kansas to the equitable relief prayed for.[1]

The importance of the case is evident from the facts stated in the complaint which on demurrer must be taken as true. If the demurrer were sustained the court would find that the actions complained of were proper on the part of a sovereign in waters flowing through its territory, although to the detriment of another sovereign lower down the stream, and therefore affected by the diversion. A principle of law would have to be very well established which would allow acts producing injury of the kind complained of, and the court would have to be very sure of the facts to be willing to overrule the demurrer, without leave to the defendant to present an answer denying the facts stated and the injury charged in the complaint. In drawing the bill, counsel for Kansas must have foreseen that the case would not be decided on demurrer, and that they would have to sustain by appropriate evidence the facts which they had stated and the injury which they had alleged in the complaint, and counsel for the State of Colorado doubtless interposed the demurrer in the hope, rather than in the expectation, that it would be sustained, and with the feeling, amounting to a certainty, that, whatever the principle of law invoked, they would have to overcome the facts stated by Kansas by facts stated by Colorado, and the injury charged by the State of Kansas by proof on the part of Colorado that the injury did not in fact exist.

Judgement of the Court in favour of Kansas.

Mr. Chief Justice Fuller delivered the opinion of the court in this very important case, and, although he had come to take a very keen interest in this class of cases, in which he was specializing, avoided the temptation of discussing at length the question of jurisdiction raised by counsel for the State of Colorado. He contented himself with a reference to the Judiciary Act of 1789, to the case of *Missouri* v. *Illinois* (180 U.S. 208), in which the question of jurisdiction was very fully and learnedly discussed by Mr. Justice Shiras, and he could have added *Louisiana* v. *Texas* (176 U.S. 1), had he not delivered the opinion of the court in that case. He pointed out the gravity of the controversy and the foresight of the framers of the Constitution in devising a method of judicial settlement between the States. All this he did in a couple of sentences, showing that these matters had become, as it were, commonplaces of the court. Thus :

The original jurisdiction of this court 'over controversies between two or more States' was declared by the judiciary act of 1789 to be exclusive, as in its nature it necessarily must be.

Reference to the language of the Constitution providing for its exercise, to its historical origin, to the decisions of this court in which the subject has received consideration, which was made at length in *Missouri* v. *Illinois*, 180 U.S. 208, demonstrates the comprehensiveness, the importance and the gravity of this grant of power, and the sagacious foresight of those by whom it was framed.[2]

After referring to the renunciation by the States of the right which they possessed to negotiate compacts and agreements, resulting in a recourse to judicial settlement and an enlargement of the scope if not of the nature of judicial power, he quoted with

[1] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 137–9).

[2] *Ibid.* (185 U.S. 125, 139–40).

approval the happy language of Mr. Justice Bradley, and indicated very clearly that, in his opinion, the controversies to which the judicial power extended were many and infinitely varied, saying :

Undoubtedly as remarked by Mr. Justice Bradley in *Hans* v. *Louisiana*, 134 U.S. 1, 15, the Constitution made some things justiciable, 'which were not known as such at the common law ; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution.' And as the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the United States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.[1]

Missouri v. *Illinois* cited (*ante*, p. 355).

To reinforce these views and to give to them greater clearness and point, he referred to and he quoted from the model opinion of Mr. Justice Shiras in *Missouri* v. *Illinois* (180 U.S. 208), to which he had referred, and in which that learned and very able judge had said on behalf of the court, from whose opinion Mr. Chief Justice Fuller had then dissented, although not from this portion of it :

If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

And the reference to the case of *Missouri* v. *Illinois* was not merely for a masterly exposition of the nature and jurisdiction of the court in controversies between the States, but also for the additional reason that, in essence, that case and the case in hand were alike, and were to be governed by the same principle. Thus he said :

As will be perceived, the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, guardian or representative of all or a considerable portion of its citizens ; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

In the case before us, the State of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action and not the action of state officers in abuse or excess of their powers.[2]

The action complained of is State action.

On this phase of the question Mr. Chief Justice Fuller uses language which cannot be too often quoted, as apt in the court of the society of nations as in the Supreme Court of the States of the more perfect Union, stating in measured and, as it seems to us of the New World, unanswerable terms the method of settling disputes when diplomacy is excluded or has broken down, and when war is not to be resorted to :

Claim of Colorado examined.

The State of Colorado contends that, as a sovereign and independent State, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries ;

[1] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 140–1). [2] *Ibid.* (185 U.S. 125, 143).

and that as the sources of the Arkansas River are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the State of Kansas the same position that foreign States occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustments of such differences, power was lodged in this court to hear and determine them.

Sovereign rights claimed by Colorado.

The rule of decision, however, it is contended, is the rule which controls foreign and independent States in their relations to each other; that by the law of Nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between States; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining State, and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld.

But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The States of this Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal'. They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.

As Mr. Justice Baldwin remarked in *Rhode Island* v. *Massachusetts*: 'Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the State in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.' 12 Pet. 657, 726.

'War', said Mr. Justice Johnson, 'is a suit prosecuted by the sword; and where the question to be decided is one of original claim of territory, grants of soil made *flagrante bello* by the party that fails, can only derive validity from treaty stipulations.' *Harcourt* v. *Gaillard*, 12 Wheat. 523, 528.

The publicists suggest as just causes of war, defence; recovery of one's own; and punishment of an enemy. But as between States of this Union, who can determine what would be a just cause of war? [1]

The Chief Justice was not worried about comity, well knowing that comity arises in response to a need, which is in due course the subject of treaty and a provision of law, and he might have said, for it is true in this class of cases and especially true in these United States, that where there is a will there is a way. Thus:

Comity demanded that the navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon and others has been at different times secured by treaty; but if a State of this Union deprives another State of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?

Applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might not exist which would justify our inter-

[1] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 143–4).

position, while the manifest importance of the case and the propositions of law can be satisfactorily dealt with, lead us to the conclusion that the cause should go to issue and proofs before final decision.[1]

The Chief Justice next considers the question of pleading, stating that, even in private suits, a court is unwilling to sustain a demurrer if the question be doubtful, and therefore overrules the demurrer with leave to answer, so that the entire case may be before it—a course followed by the court in this case. The question was one whereof the tribunal had jurisdiction, and although some of the prayers contained in the complaint were open to objection, nevertheless the prayer for general relief would, even if the special prayers were to be rejected, allow the court to grant such relief upon the general prayer as the facts put in issue would justify. Thus, he says:

Jurisdiction affirmed.

Without subjecting the bill to a minute criticism, we think its averments sufficient to present the question as to the power of one State of the Union to wholly deprive another from the benefit of water from a river rising in the former, and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.

We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless the specified prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that, such appropriate decree as the facts might be found to justify, could be entered, if consistent with the case made by the bill, and not inconsistent with the specified prayers in whole or in part, if that were also essential. *Tayloe* v. *Merchants' Insurance Company*, 9 How. 390, 406; Daniell, Ch. Pr. (4th Am. ed.) 380.

Advancing from the preliminary inquiry, other propositions of law are urged as fatal to relief, most of which, perhaps all, are dependent on the actual facts. The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by the demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.[2]

In order that the case as it appeared to the court might be made perfectly clear, and that the action of the court should be justified in refusing to decide it upon demurrer without the defence to be set up in the answer, Mr. Chief Justice Fuller briefly restates the case, which he had summarized at very great length in the statement used by the official reporter. For the same reason the recapitulation of the facts is here given for the convenience of the reader in the words of the Chief Justice:

The gravamen of the bill is that the State of Colorado, acting directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas River through its channel on the surface, and through a subterranean course, across the State of Kansas; that this is threatened not only by the impounding, and the use of the water at the river's source, but as it flows after reaching the river. Injury, it is averred, is being, and would be, thereby inflicted on the State of Kansas as an individual owner, and on all the inhabitants of the State, and especially on the inhabitants of that part of the State lying in the Arkansas valley. The injury is asserted to be threatened, and is being wrought, in respect of lands located on the banks of the river; lands lying on the line of a subterranean flow; and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that

[1] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 144). [2] *Ibid.* (185 U.S. 125, 145).

Colorado in doing this is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

The State of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream, and while she conceded that this rule has been modified in the Western States so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of a prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other States and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.[1]

And to decide the case the court felt that evidence of a far-reaching character should be introduced, the Chief Justice, speaking for a unanimous court, saying:

The Court will hear the evidence.

We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River in Kansas; whether what is described in the bill as the underflow is a subterranean stream flowing in a known and definite channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties thereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas River; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof.

Demurrer overruled.

The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence.[2]

Admitting the remedy, what was the remedy to be—not negotiation, not war. It could only be law; and what law? The Supreme Court was clear as to the law to be applied, and in stating it, it declared that the Supreme Court was in fact as well as in theory the Court of the States, that it was not merely the prototype of an international tribunal, but that it was that international tribunal. For did not the unanimous court say, by the mouth of its Chief Justice:

The Court as an international tribunal.

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand.[3]

49. State of Tennessee v. State of Virginia.

(190 U.S. 64) 1903.

The second of the cases of *Tennessee* v. *Virginia* (190 U.S. 64), decided in 1903, and the fourth of the series between the two States in controversy is important as definitely establishing the boundary line between them. It has a further interest in that the compact of 1803 was found by the States not to meet their present needs, and in order that the boundary line to be run and to be marked should be definitive, because

[1] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 145–6). [2] *Ibid.* (185 U.S. 125, 147).
[3] *State of Kansas* v. *State of Colorado* (185 U.S. 125, 147). For the final phase of this case see *State of Kansas* v. *State of Colorado* (206 U.S. 46), *post*, p. 431.

acceptable to them and as suited to changed conditions, the two States entered into a compact, by virtue whereof a small strip of territory belonging to Tennessee should be ceded by that State to Virginia the Mother of Presidents as well as of commonwealths. The method by which this was done is noteworthy, as it shows how nations, if they will, can legislate concurrently and thus openly, without resorting to the dark and devious ways of diplomacy and the secrecy which that method of procedure entails.

Joint legislative action of the parties approved by Congress, 1901.

The legislature of Tennessee passed a law, approved by its Governor January 28, 1901, ceding the strip of territory in question to Virginia, and the legislature of Virginia passed an act approved February 9, 1901, accepting the cession of the bit of territory. Recognizing, however, that this was a compact between the States by means of concurrent acts of their respective legislatures, the States sought and obtained, as is required by the Constitution, the consent of the Congress of the United States to the compact, which was given by joint resolution approved by the President March 3, 1901. The report of the commissioners on the boundary, modified in accordance with the compact of 1901, was filed January 5, 1903, accepted by the States in controversy, and confirmed on the 1st day of June of the same year.

Report of Commissioners, 1903.

Were it not for the compact between the States of 1901, modifying their earlier compact of 1803, it would be sufficient for present purposes to state that the line as traced and marked in the report of the commissioners was declared by the Supreme Court to be the true boundary between the States, inasmuch as the procedure in this phase of the case is similar to that followed in entering the final decree of the court in other boundary cases. It is, however, because of this difference and of its international import—because what States of the Union can do by concurrent action of their legislatures nations can likewise accomplish—this portion of the decree of the court as announced by Chief Justice Fuller is quoted, omitting the portion of the decree taxing the States with equal moieties of the expenses, and the order that fifty printed copies of the decree, including the report, be transmitted to the Attorney-General of each of the States in controversy.

Report confirmed by the Court.

It is thereupon ordered, adjudged and decreed that the real, certain and true boundary line between the States of Tennessee and Virginia, as actually run and located under the compact and proceedings had between the two States in 1801–1803, and as adjudged by this court on the third day of April, 1893, in said original cause in equity, wherein the State of Virginia was complainant and the State of Tennessee was defendant as aforesaid, was at the institution of this suit, and now is, except as hereinafter shown, as described and delineated in said report filed herein on January 5, 1903, as aforesaid.

And it further appearing to the court, and it being so admitted by both parties, that since the institution of this suit and the decretal order of April 30, 1900, as aforesaid, a compact was entered into by the States of Tennessee and Virginia, expressed in the concurrent laws of said States, namely, the act of the general assembly of Tennessee, approved January 28, 1901, entitled 'An act to cede to the State of Virginia a certain narrow strip of territory belonging to the State of Tennessee, lying between the northern boundary line of the city of Bristol, in the county of Sullivan, and the southern boundary line of the city of Bristol, in the County of Washington, State of Virginia, being the northern half of Main street, of the said two cities', and the reciprocal act of the general assembly of Virginia approved February 9, 1901, entitled 'An act to accept the cession by the State of Tennessee to the State of Virginia, of a certain narrow strip of territory claimed as belonging

to the State of Tennessee, and described as lying between the northern boundary line of the city of Bristol, in the county of Sullivan, State of Tennessee, and the southern boundary line of the city of Bristol, in the county of Washington, State of Virginia, being the northern half of the Main street of the said two cities '.

And it further appearing that said compact received the consent of the Congress of the United States by joint resolution approved March 3, 1901, as follows :

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That a recent compact or agreement having been made by and between the States of Tennessee and Virginia, whereby the State of Tennessee, by an act of its legislature approved January twenty-eighth, nineteen hundred and one, ceded to the State of Virginia certain territory specifically described in said act and being the northern half of the main street between the cities of Bristol, Virginia, and Bristol, Tennessee, and the State of Virginia, by act of its general assembly, approved February ninth, nineteen hundred and one, having accepted said cession of the State of Tennessee, the consent of Congress is hereby given to said contract or agreement between said States fixing the boundary line between said States as shown by said acts referred to, and the same is hereby ratified.

And said commissioners, in their said report, having ascertained and recommended the straight line from the end of the ' diamond-marked ' or compact line of 1801–1803 to the corner of the States of North Carolina and Tennessee as the true boundary line between the States of Virginia and Tennessee between those two points, the court, approving said recommendation and finding of said commissioners, doth adopt the same.

And the court, being of opinion that it is proper to recognize the line so established by said last-mentioned compact of 1901 as the real, certain, and true interstate boundary line within and between said two cities, and to definitely determine and fix in this cause what is the real, true and certain boundary line between said States throughout the entire length thereof from the corner of the States of North Carolina and Tennessee, on Pond Mountain, to the corner of Virginia and Kentucky, at Cumberland Gap, doth therefore adjudge, order, and decree that the entire real, certain, and true boundary line between the States of Tennessee and Virginia is the line described and delineated in said report filed herein on January 5, 1903, modified as to so much of said line as lies between the two cities of Bristol, by the aforesaid compact of 1901 between the two States, and as so described, delineated, and modified said boundary line from the said North Carolina corner to the eastern end of the compact line of 1801–1803, known as the ' diamond-marked ' line, and thence to Cumberland Gap, is hereby determined, fixed and established.[1]

50. United States v. State of Michigan.

(190 U.S. 379) 1903.

In *United States* v. *Michigan* (190 U.S. 379), decided in 1903, the point of interest is that the United States appeared in its own right as plaintiff against one of the States as defendant. Since the right of the United States to sue a State of the Union was admitted, and the jurisdiction of the Supreme Court in the premises established, the importance of the case lies in the resort of the United States to the court, furnishing an additional precedent for such action, rather than in the facts of the case as set forth in the pleadings and the principles of law involved.

Claim for balance of moneys advanced to build a canal.

The United States, alleging that the State of Michigan is indebted to it for moneys advanced in the construction of the St. Mary's River canal and that the State has not repaid the sums of money so due, filed its original bill in equity against the

[1] *State of Tennessee* v. *State of Virginia* (190 U.S. 64, 65–7).

defendant in the Supreme Court. The defendant filed a demurrer, alleging a want of equity and that the plaintiff, even supposing a right of action existed and the court could assume jurisdiction thereof, has been guilty of such gross laches as to bar it of relief.

Demurrer alleging (1) want of equity, (2) laches.

On August 26, 1852, Congress granted a right of way through a military reservation of the United States in the State of Michigan and appropriated to the State 750,000 acres of land, to be afterwards selected, in order to construct a canal and a lock where Lake Superior empties into the St. Mary's River at or near St. Mary's Falls. By the first section of the act, the canal was to be 100 feet wide with a depth of 12 feet, and the locks at least 250 feet long and 60 feet wide. The 750,000 acres of land granted by the United States in order to enable the State to construct the canal were to be selected by the State with the approval of the Secretary of the Interior from any lands within the State subject to private entry, and the lands so granted were to be disposed of by the legislature of the State for the purpose of building a canal, which was to be and remain a public highway for the use of the United States, free from toll or charges upon vessels of the General Government engaged in the public service. It was further provided that the State of Michigan should be bound to pay to the United States the proceeds from the sales of the lands at a rate not less than $1.25 per acre unless the canal should be begun within three and completed within ten years ; that the legislature of the State should keep an accurate account of sales and net proceeds of the lands so granted, and of all expenditures in connexion with the canal and its earnings, and make a return thereof annually to the Secretary of the Interior ; that until the reimbursement for all advances necessarily made in the construction of the canal, with legal interest on such advances, the State was authorized to levy tolls sufficient to pay the necessary expenses for the care and repair of the canal ' until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest '. And it was finally provided that, before any of the lands in question should be disposed of, the route of the canal was to be established and a plat or plats thereof filed in the office of the War Department and a duplicate in the office of the Commissioner of the General Land Office.

Act of Congress (1852) providing for a canal.

Land granted,

to be sold by Michigan for a building fund ;

working expenses to be met by tolls.

On February 5, 1853, the legislature of the State of Michigan accepted the grant of the lands for the purpose of building the canal, subject to the conditions contained in the act of Congress. In addition to the appointment of commissioners and an engineer to undertake and to construct the canal, and a statement of the methods to be followed in the making of the contracts and the sale and disposition of the lands, the seventh section provided that the commissioners should keep an accurate account of the sales and net proceeds of the lands and of all expenditures in connexion with the construction of the canal and its earnings, and return a statement thereof to the Governor on or before the first Monday in October of each year, who in turn should transmit it, or a copy thereof, to the Secretary of the Interior at Washington in accordance with the Act of Congress.

Act accepted by Michigan, 1853.

The canal was built and put in operation, but, as alleged in the bill, the report to the Secretary of the Interior, as required by the act of Congress and the act of Michigan accepting the conditions of that act, was not made. It was further charged that the canal was built from the proceeds of the land granted by the Congress, all

Canal built.

Michigan contributed nothing.

of which was sold; that the State of Michigan contributed nothing to the construction of the canal; and that the expenses involved in its operation were met by the tolls upon its use during the period in which the canal was under the control of the State. It was also stated, in this connexion, that the moneys received from the tolls exceeded the expenditures, and that these moneys were retained by the State of Michigan, without, however, intent to make of them a source of profit, until the canal, by act of the State legislature of March 3, 1881, was turned over to the United States, at which time there was, to quote the bill, 'in the treasury of the State of Michigan, belonging to the fund of said canal, not appropriated or the expenditures thereof in any way provided for, the acknowledged sum of $68,927.12,' and that there was also in the custody of the State of Michigan, at the time of the transfer of the canal, a large quantity of tools and property, the exact description of which was unknown, which should have passed to the United States with the canal, which was accepted by the Secretary of War, on behalf of the United States, in accordance with the act of Congress of June 14, 1880.

but retained the surplus.

Claim that the land was granted in trust.

So far the question is largely one of book-keeping. But there was a larger issue in the case, the United States maintaining that the grant of lands, although having the appearance of a gift to the State of Michigan, was not intended as such but to furnish the fund from which the canal could be constructed, which canal was not merely for the benefit of Michigan but of the adjoining States and for the United States, and that the balance in the treasury of the State at the time of the transfer of the canal to the United States, together with the property of the canal on hand, should be returned to the United States, for which it was held in trust. Notwithstanding the existence of this trust, which it had on occasion acknowledged, the State of Michigan, by an act of 1897, directed the balance of the canal fund to be paid into the treasury of the State, the balance of the property belonging thereto to be sold and gathered into the treasury, on the ground that no request had ever been made for the balance or any part thereof by the United States, or any person on their behalf. This the United States denied, and the bill which it filed, as stated in the original report, 'prayed for an accounting as to the sales of the lands, the prices obtained therefor, the application of the proceeds of the sales or exchange of such lands to the cost of the construction of the canal, the tolls received, their application, and also an accounting as to the tools on hand at the time of the transfer of the canal to the United States.'[1]

Account prayed for.

Michigan denies any trust,

The Attorney-General, appearing for the State of Michigan, insisted in his argument, as stated in the official report of the case, that 'there was no trust relation between the United States and the State of Michigan, but the State, by the act of 1852, took an absolute, unconditional, and indefeasible title upon its acceptance of the grant and the completion of the canal, and by right of such ownership belongs to it any incidental pecuniary benefits or earnings that may have arisen from its operation of the canal'.[2] But admitting, for the purpose of argument, the allegations of the bill, counsel contended that the conditions imposed by the act of Congress, formally accepted by Michigan, were not violated by the State, and that in any event 'the United States, by subsequently taking over and accepting the canal from the State, particularly in the light of the several acts of offer and acceptance, must be

and alleges acquiescence by United States.

[1] *United States* v. *State of Michigan* (190 U.S. 379, 392). [2] *Ibid.* (190 U.S. 379, 393).

held to have waived any claims for a breach of the condition imposed by the original grant ' ; that ' the declarations of the legislature and officers of the State of Michigan did not create a trust, and certainly not one in which the United States would have a beneficial interest as *cestui que trust* ' ; and, by way of recapitulation, that ' the acts of Congress and the acts of the legislature of Michigan relating to the taking over of the canal by the United States operated as a settlement of all accounts between the United States and the State, rendering an accounting unnecessary '.[1]

Arguments for the United States.

Counsel for the United States were, naturally, of a different opinion, although embarrassed by the fact that the words of grant, if taken literally, might convey the impression of gift, whereas, if construed in connexion with their context, they were subject to limitation and were in effect a trust. Thus :

The original granting act had a two-fold purpose. First, the granting of an easement or right of way through the public domain for the purpose of constructing the canal. Second, the appropriation of lands and the disposal of the same, the construction of the canal and its operation and maintenance. While it is true the term ' granted ' was used in the act, it will be observed that the property granted was ' for the aforesaid purposes and no other '.[2]

But if ambiguous in isolation they were not so if taken in connexion with the purpose of Congress by the act. Thus :

The intention of Congress that the whole enterprise was merely a trust is evident from the fact that due care was taken to provide in the act for an annual accounting and reports by the State to the Secretary of the Interior. These reports and accounts have never been rendered, and thus it becomes necessary to invoke this court in aid thereof. The Government is entitled to an accounting for all the lands sold, the prices received for them, the amount of tolls earned and collected, and the amount of money expended on behalf of the canal. It is also entitled to any moneys on hand at the time the canal was turned over, as well as all tools, implements, machinery, &c., or their equivalent in money.[3]

While this was the meaning of the act as read by counsel, it was further contended that it was the understanding of the parties, as evident from their subsequent actions. Thus :

The act of the legislature of Michigan accepting the grant subject to all the conditions expressed in the act of Congress completed the trust relation. Subsequently, the State, in passing other legislation regarded it as a trust and so characterized it from time to time. The report of the state treasurer also regarded it in this light in reporting the amount of money on hand in the canal fund after the canal had been turned back to the United States.

The money had never been paid over by the State. By a joint resolution of its legislature, the amount was converted to the use of the State and covered into its general fund.

The State took the lands for the purpose of constructing the canal upon certain conditions and limitations, obligating itself to render accounts and reports of all its doings in the premises. The acts of Congress and the acts of the legislature taken together clearly indicate that a trust was created and the United States now seeks an accounting by the trustee.[4]

For these reasons, counsel for the United States maintained that the bill was founded in law, and that the demurrer interposed by counsel for the State of Michigan should be overruled.

[1] *United States* v. *State of Michigan* (190 U.S. 379, 394–5).
[2] *Ibid.* (190 U.S. 379, 394). [3] *Ibid.* (190 U.S. 379, 395). [4] *Ibid.* (190 U.S. 379, 395).

On the facts as disclosed by the pleadings, the case might seem to be one of everyday occurrence : land granted by A to B and taken by the grantee as in full ownership ; a claim by the grantor that the lands conveyed were for a specific purpose and that they could be used for none other, thus creating a trust, and upon denial of the trust by the grantee a bill for an accounting, of which any court of equity would take jurisdiction. Such was the law, but the case made by the facts was not ordinary. It involved the construction of a canal whereby the vast commerce of the west should pass through Lake Superior into Lake Huron, thence to points east and to the uttermost parts of the earth. To be sure, the canal was a ditch, but it was not an ordinary ditch, and its construction was not merely of interest to Michigan, the adjoining States, and the United States, but to the world at large, and in this sense the case can be said to have an international interest in fact if not in law, which international interest, however, is given to it in law by the resort of the United States to the Supreme Court for the settlement of its dispute with Michigan.

Judgement of the Court in favour of the United States.

Mr. Justice Peckham delivered the opinion of the court, which in this case was unanimous, overruling the demurrer but leaving the State, as in previous cases, free to answer the bill should it so desire. And this brief statement of the court's decision necessarily involves the acceptance of the contention of the United States that, on the case as disclosed by the pleadings, the grant of Congress created a trust ; that, after the construction and operation of the canal and its transfer to the United States, the State of Michigan was responsible to the United States for the sums of money it had received in addition to the tools and to the property on hand, inasmuch as the entire undertaking was impressed with the trust.

The case, however, cannot be thus curtly dismissed, as there were issues raised by counsel and discussed in the opinion of the court which should be more than mentioned, as they are of importance in the judicial settlement of controversies between States. In the first place, Mr. Justice Peckham lays down the very familiar rule that the intent of the parties is to be ascertained, not merely from isolated words or expressions but from the entire transaction, if necessary, and when that intent is ascertained it is to be given its full effect. In addition, the court is not unmindful that it is dealing with a dispute between States, and that the large view should prevail over mere technicalities.

After referring, without discussion, to the case of *United States* v. *Texas* (143 U.S. 621, 642), decided in 1892, as authority for assuming jurisdiction of a suit of the United States against a State of the Union, Mr. Justice Peckham thus approached the question before the court :

> In the consideration of this case, the controlling thought must of course be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but in view of the character of the subject, the language should have its ordinary and usual meaning.
>
> Whether, under these circumstances, technical words were used to express the thought that the State was to be a trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the State should occupy the position of trustee in the construction and operation of the canal. *Winona &c. R. R. Co.* v. *Barney*, 113 U.S. 618, 625.[1]

[1] *United States* v. *State of Michigan* (190 U.S. 379, 396).

In order to arrive at the intent of the parties the learned Justice makes the following statement of the condition of affairs at the time when it was proposed to construct the canal, and of the means whereby it was to be built and maintained :

Purpose of the statutes considered.

The general purpose of these statutes was to build a ship canal, by means of the funds procured from the sale or other disposition of the public lands of the United States, to be used by all those whose business or pleasure should call them to pass through it in order to reach their destination.

As is well known, the Saint Marys River connects the waters of the lakes, Huron and Superior. The navigation of the river is interrupted by Saint Marys Falls, and it early became necessary, in order to provide conveniences for a rapidly increasing commerce, that there should be built a ship canal around these falls, so that large vessels coming from or going to Lake Superior should be thereby enabled to pursue their voyage to the east or to the west without interruption by those falls. The State of Michigan did not feel at that time (1850–1852) able to undertake such work herself, although it was a matter of much importance to many of her citizens. Finally the United States passed the act of 1852, set out in full in the foregoing statement. The State subsequently accepted the same with all the conditions contained therein. We think it sufficiently appears from a perusal of these two acts that it was assumed that the grant of the right of way through the lands of the United States and the grant of the 750,000 acres of its public lands in the State of Michigan would pay the cost of construction of the canal, and the tolls to be collected by the State would repay it for all advances made by it in the repairs which would naturally and from time to time be required in such a work. There was no reason why the United States should provide that the State of Michigan should actually receive a profit over and above the payment to it of all its expenses for the construction of the canal and for keeping it in repair. If, through the action of the United States, a public work of national importance were constructed within the boundaries of that State, and the State itself reimbursed for every item expended by it in the construction and in the keeping of such work in repair, it would certainly seem as if the State could properly ask no more. It was clearly not the intention that the State should realize a beneficial interest from the transaction between the United States and the State over and beyond that which would arise from the existence of this canal. The cost of its construction and the keeping of it in repair were not to be borne by the State, even to the extent of a single dollar. That the parties supposed the cost would be borne by the United States is proved by an examination of the statutes, and if it be a fact, it goes far to show that the State was in this matter acting in effect and substance as an agent, or, in other words, as a trustee for the United States, and that the transaction was not to be a source of profit to the State, by reason of getting more from the United States than it would cost to build the canal.[1]

The State a trustee for the United States.

Having thus discovered the intent of the parties, the learned Justice states that their expectation was realized, in that the proceeds from the sale of the lands and the tolls imposed for its use met all the expenses involved in the undertaking and its maintenance ; and after an analysis of the act of Congress, with particular reference to the fact that the grant was 'for the purposes aforesaid and no other', the learned Justice states that, in the opinion of the court, ' the act does not grant an absolute estate in fee simple in the land covered by this right of way. It was in effect a grant upon condition for a special purpose ; that is, in trust for use for the purposes of a canal, and for no other. The State had no power to alien it and none to put it to any other use or purpose. Such a grant creates a trust at least by implication. We have just held in *Northern Pacific Company* v. *Townsend* (190 U.S. 267), in reference

[1] *United States* v. *State of Michigan* (190 U.S. 379, 396–7).

to a grant of a right of way for the railroad, that it was " in effect a grant of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted " '.[1]

Mr. Justice Peckham then proceeds to an examination of the act of Congress of 1852 and the act of the legislature of Michigan accepting the grant, and upon these two acts of the respective legislatures he thus comments :

Reading both statutes, it seems to us the effect was to create a trust, and that the State was made the trustee to carry out the purposes of the act of Congress in the construction and maintenance of the canal. If there were funds arising from the sale of the lands over and above the cost of construction and other expenses of the canal, it could not within reason (after a perusal of these two statutes, with the provisions for accounting for sales and net proceeds of lands, and the other provisions of the statutes already mentioned) be supposed the parties understood that Michigan was to have for its own treasury the balance arising beyond such cost, maintenance, etc., of the canal. If a surplus arose in the course of the operation of the canal the tolls were to be at once reduced, and it seems to us that that surplus would upon a fair and reasonable construction of the acts belong to the original owner of the lands, by means of which the State, as in substance the agent of the United States, was enabled to construct the canal and secure the tolls arising from its operation, to be expended upon its maintenance and for necessary repairs. This would certainly be so after the formal transfer of the canal and after the surplus was conclusively ascertained, and was subject to no further claims for repairs of the canal on the part of the State. The tolls were in fact the proceeds of the trust fund (the lands) which belonged to the United States, and should be transferred with the rest of the trust property.[2]

The surplus belongs to the United States.

But the case of the United States does not end here, for, admitting that there might be a reasonable doubt, after examining the statutes, as to the meaning of the parties, their acts in pursuance of the statutes are entitled to consideration, as also the principle of construction that, in matters governmental, every intent is in favour of the grantor as against the grantee ; that is to say that nothing is to pass from the grantor unless expressly stated or by necessary implication. On this second point, which he had first considered, Mr. Justice Peckham said :

Rule governing the interpretation of grants.

If any particular part of the statute in this case were ambiguous or its meaning doubtful, of course the intention must be deduced from the whole statute and every part of it. Hence the importance of those provisions which in effect, if carried out, prevent the State from making any direct profit by the construction of the canal or from the tolls received from vessels passing through it. And where words are ambiguous, legislative grants must be interpreted most strongly against the grantee and for the Government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public. *Rice* v. *Railroad Company, supra*, p. 380. This rule of construction obtains in grants from the United States to States or corporations in aid of the construction of public works. 1 Black, 381.[3]

Conduct of the parties considered.

Next, as to the understanding of the parties as evidenced by their acts. In 1859 a preamble to the law of the State of Michigan specifically refers to the grant in question as ' the trust created by said act of Congress and the assent of this State thereto '. And in 1883 the Treasurer of the State, and *ex officio* a member of the

[1] *United States* v. *State of Michigan* (190 U.S. 379, 398).
[2] *Ibid.* (190 U.S. 379, 400–1).
[3] *Ibid.* (190 U.S. 379, 401).

board of control of the St. Mary's Falls Ship Canal, used the following language in his annual report to the Governor and by him transmitted to the legislature of the State: Admission of the trust by Michigan.

Since my last report, the remainder of the personal property belonging to the Saint Marys Falls Ship Canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the State has ceased and the moneys in the fund remain in the state treasury under act No. 17, laws of 1881, the State acting simply as trustee.[1]

The learned Justice next refers to the act of Michigan of 1897 authorizing the moneys of the canal fund on hand and the proceeds arising from the sale of the tools and implements belonging to it to be paid into the State treasury, on the ground that 'no claim has been made for any part of such moneys, either by any persons who paid the same into said fund or by the General Government', from which he concludes, on behalf of the court, that:

The State and its public officers thought that a trust had been created, and that the State had received the lands in trust for the purpose of carrying out the provisions of the Federal Statute. A surplus arising from the sales of lands and from the tolls, over and above all cost of construction, repairs, etc., after the formal transfer of the canal itself, belongs to the United States, and it is the proper party to recover the same.[2]

Mr. Justice Peckham also refers to a recognition of a very damaging character on the part of the State of Michigan, which, by joint resolution of its legislature in 1869, offered to transfer the canal and its control to the Government on the ground that improvements were required to be made which the State was either unwilling or unable to make, on the condition, as stated by the learned Justice, in summary form that

The State should be first guaranteed and secured to the satisfaction of the board against loss, by reason of its liability, on certain bonds which had been issued by it under authority of an act to provide for the repairs upon the canal, 'and to perform the trust respecting the same,' approved February 14, 1859.[3]

It is true that this resolution was not acted upon at the time, but in 1880 the Congress, by act approved June 14, authorized the Secretary of War to accept from Michigan, and on behalf of the United States, the canal. In pursuance of this act the State of Michigan, by its legislature, authorized the board of control of the State of Michigan to transfer the canal to the Secretary of War, and not only to convey the title but also 'At any time when they may deem it proper, *to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund . . . Provided, such transfer of material and payment of moneys* shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connexion with the Saint Mary's Falls Ship Canal for the use of disabled vessels'.[4] To break the force of this recognition of the trust counsel for Michigan insisted that it was upon the condition contained in the proviso and that the United States would not be entitled to the proceeds until the dry-dock should be built. But the learned Justice made short shrift of this contention, by the mere statement that if a trust existed it was not for the trustee to impose conditions upon it.

[1] *United States* v. *State of Michigan* (190 U.S. 379, 402).
[2] *Ibid.* (190 U.S. 379, 403). [3] *Ibid.* (190 U.S. 379, 403). [4] *Ibid.* (190 U.S. 379, 404).

On the whole question, Mr. Justice Peckham thus concluded the opinion on behalf of his brethren :

We are of opinion that the bill shows a cause of action against the State of Michigan as trustee, and its liability to pay over the surplus moneys, (if any,) which upon an accounting it may appear have arisen from the sale of the granted lands, over and above all cost of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus moneys arising from the tolls collected, which latter sum by the demurrer is admitted to amount to $68,927.12. This sum the United States in substance (especially in the fourth paragraph of the bill) admits is all that is due from the State on account of such tolls. It is not entitled to go back of that amount and call for an accounting as to the tolls prior to the transfer of the canal to the United States. The latter is also entitled to recover the value of the tools, etc., mentioned in the bill, as of the time of the transfer of the canal.

Defence of laches negatived.

We think there is no ground of defence arising from any alleged laches on the part of the United States in bringing this suit. Assuming the existence of what would be laches in a private person, the defence that might arise therefrom is not available ordinarily against the Government. *United States* v. *Beebe*,, 180 U.S. 343, 353.

Demurrer overruled.

There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defence to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon.[1]

In accordance with the decision of Mr. Justice Peckham, counsel for Michigan filed its answer, to which the United States interposed a replication and moved to file stipulation to take testimony, which was granted, concurred in by counsel for Michigan. The Court granted the leave to take testimony and to appoint commissioners. The case, however, did not proceed further, as appears from the following entry :

The United States, Complainant, *v.* The State of Michigan. November 19, 1906. Dismissed, on motion of *The Solicitor General* for the complainant. *The Attorney General* for complainant. *Mr. Horace M. Oren* and *Mr. Charles A. Blair* for defendant.[2]

51. State of South Dakota v. State of North Carolina.

(192 U.S. 286) 1904.

The case of *Chisholm* v. *Georgia* (2 Dallas, 419), decided in 1793, was too much for the States of that day, and their citizens who felt that in forming a more perfect union, and in subjecting the controversies between the States to judicial power, they had not broken down the barriers separating the State from the citizen to the extent of making a State as such, answerable to a citizen of another State of the Union.

States and people were alike unwilling to have any doubt or uncertainty obstruct their intent. Therefore, as already stated in the course of this narrative, the Eleventh Amendment to the Constitution was proposed and adopted by virtue whereof the judicial power of the United States was not to be construed to extend to suits by

[1] *United States* v. *State of Michigan* (190 U.S. 379, 405). [2] *Ibid.* (203 U.S. 601).

citizens of a State of the Union, leaving, however, untouched controversies between the States, to which by the express language of the Constitution the judicial power extends.

Attempts have frequently been made, but have proved unavailing, to sue an official of the State, either in his official or individual capacity, in order to circumvent the force and effect of the amendment, but the Supreme Court has invariably held that a suit against an official or against a person who happens to be an officer of the State, is to be regarded as against the State whenever the act concerning which the suit is brought could not be done by the person as an individual, but only by that individual as a State official.

In the leading case of *Hans* v. *Louisiana* (134 U.S. 1), decided in 1889, the Supreme Court decided that the Amendment would be wounded in its spirit if a citizen of the State of Louisiana could by bringing suit in the Circuit Court of the United States reach the State of Louisiana whereof he was a citizen, although the Amendment did not in express terms apply to this situation. However, leaving aside suits brought by individuals as such, the Supreme Court held after elaborate argument and great consideration that, it should not accept jurisdiction of a suit by a State on behalf of its citizen on the ground that the controversy contemplated by the Constitution should be between States as such, acting in their own interests instead of espousing a claim of a citizen which that citizen was unable to put in suit because of the Amendment.

The question was left open whether a State to which its citizen had assigned the full right and title in and to the claim could not then appear before the Supreme Court, and summon to its Bar as a defendant the State of the Union against which its citizen possessed the claim which he could not as an individual enforce by judicial process. This question arose in the case of *South Dakota* v. *North Carolina* (192 U.S. 286), and was decided in favour of the plaintiff in 1904.

Action on N. Carolina bonds presented by the holder to S.Dakota.

The case arose in the following manner: The holder of ten bonds of the State of North Carolina outstanding, due and unpaid, made a gift thereof to the State of South Dakota, which apparently in anticipation of the gift, had authorized it to be accepted, and suit to be brought to collect donations made by private parties when judicial proceedings should be necessary.

To secure the payment of these bonds given for the express purpose of compelling their payment, the State of South Dakota as plaintiff began an action against the State of North Carolina as defendant in the Supreme Court of the United States.

Summary of the facts.

The principle in the case is simple; the facts involved are complicated. For present purposes it may be said that in 1849 the State of North Carolina chartered the North Carolina Railroad Company, with a capital of $3,000,000, divided into 30,000 shares of $100 each, and the State itself subscribed for 20,000 of these shares. To pay the subscription, the statute authorized the borrowing of money and to pledge as a security for its repayment such stock of the railroad company as should be held by the State. In 1855 a further subscription of 10,000 shares was authorized by statute upon the same terms and with the same security. At the same session of the Legislature the Western North Carolina Railroad Company was incorporated, and the State authorized the State to subscribe for stock and to issue bonds to be secured by the stock which the State should hold in the company. In 1866 a statute

was passed by the Legislature of the State entitled, ' An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes ', which after reciting prior acts authorizing the issue of bonds and stating that a portion thereof had already been issued, authorized and directed the Treasurer, whenever it became his duty under the provisions of the acts of the sessions of 1854–5, and of 1860–1,

Issue of the bonds, 1866.

to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina Railroad, [chartered by act of 1849], as collateral security for the payment of said bonds, and executed and delivered, with each several bond, a deed of mortgage for an equal amount of stock to said North Carolina Railroad Company, said mortgage to be signed by the Treasurer and countersigned by the Comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company [incorporated by act of 1855] ; and, further, that such mortgages shall have all the force and effect, in law and equity, of registered mortgages without actual registry.

Under this act of 1866 bonds were issued in the sum of $1,000 each, and upon each one of which, signed by the Treasurer and countersigned by the Comptroller of the State, was endorsed the following statement :

that ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

The bonds under this act issued July 1, 1867, were issued for a period of thirty years, and they therefore became due in 1897. The ten bonds in question for which suit was brought belonged to this series. It should further be said before passing from this phase of the subject, that in 1879 the State of North Carolina appointed commissioners to adjust and compromise the State debt, and all of the bonds issued under the act of 1866 had been compromised with the exception of about $250,000. Of the outstanding bonds, Simon Shafer and Samuel M. Shafer, individually or as partners, owned a large proportion, and had owned them for about thirty years.

Act of S. Dakota for acceptance of gifts, 1901.

In this state of affairs South Dakota passed on March 11, 1901, and in anticipation, it is supposed, of an impending gift, an act providing

That whenever any grant, devise, bequest, donation or gift or assignment of money, bonds or choses in action, or of any property, real or personal, shall be made to this State, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this State ; and all such bonds, notes or choses in action, or the proceeds thereof when collected, and all other property or thing of value, so received by the State as aforesaid shall be reported by the governor to the legislature.

Mr. Shafer gave ten of the bonds issued under the act of 1866, and accompanied it with the following letter dated New York, September 10, 1901, addressed to the Hon. Charles H. Burke, then governor of the State of South Dakota :

Gift of the bonds to S. Dakota.

The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second-mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

The bonds are all now about due, besides, of course, the coupons, which amount to some one hundred and seventy per cent. of the face of the bond.

The holders of these bonds have been advised that they cannot maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.

These bonds can be used to great advantage by States or foreign governments ; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

If your State should succeed in collecting these bonds it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating State, rather than accept the small pittance offered in settlement.

The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.[1]

As already stated, South Dakota accepted the gift and brought suit in the Supreme Court against North Carolina, and joined as defendant two individuals as representatives of holders of the bonds issued under the acts of 1849, 1855, and of the acts of 1855 and 1866. As, however, the Court decided that these representatives were improperly joined and dismissed the bill as against them, taxing South Dakota with costs in this part of the proceeding, this phase of the question is omitted from further consideration.

Bill for foreclosure.

In the portion of the bill in so far as material to the present purpose, the State of South Dakota prayed in the summary thereof given in the official report,

that North Carolina be required to pay the amount found due on the bonds held by the plaintiff, and that in default of payment North Carolina and all persons claiming under said State might be barred and foreclosed of all equity and right of redemption in and to the thirty thousand shares of stock held by the State, and that these shares or as many thereof as might be necessary to pay off and discharge the entire mortgage indebtedness, be sold and the proceeds after payments of costs be applied in satisfaction of the bonds and coupons secured by such mortgages ; and also for a receiver and an injunction.[2]

The first of the individual defendants made no answer, the second admitted the allegations of the bill and asked that all the stock be sold in satisfaction of the mortgage bonds of which he was charged to be the representative. The State of North Carolina in its answer to the bill denied both the jurisdiction of the Court and the title of the plaintiff.

There are two aspects of the case which may be put aside as immaterial, and one mentioned in passing as preliminary to the main question. One of the contentions of the State of North Carolina was that the bonds were not issued in conformity with the statute, and that the mortgages were improperly executed and were therefore null and void.

Judgement of the Court in favour of S. Dakota.

Mr. Justice Brewer, on behalf of the Court, replied that there could be ' No reasonable doubt of the validity of the bonds and mortgages in controversy '.

A second contention was the joinder as defendants of individuals representing

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 289–90).
[2] *Ibid.* (192 U.S. 286, 291).

holders of bonds issued under the authorized statutes of North Carolina. As the Court held that they were not necessary parties and dismissed as to them taxing South Dakota with costs, it is unnecessary to dwell upon this matter.

The motive of the gift is immaterial.

A third question, material if it affected the title of the State, but immaterial if it did not, was the motive with which the gift was made. Mr. Justice Brewer speaking for the Court brushed aside this defence of counsel for North Carolina, with the curt statement which, however, he re-enforced by authority that, ' the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction '.[1] As, however, the question is interesting and important though well settled, it is desirable to quote the language of the Supreme Court in a comparatively early and comparatively recent case on the question of motive.

Thus, in the case of *McDonald* v. *Smalley* (1 Peters, 620, 624), decided in 1828, it appeared that title to the property in question had been conveyed to the plaintiff in the belief that it would be sustained by the Federal although it would not be recognized by the State Court. Mr. Chief Justice Marshall, in overruling the contention, observed :

This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties. McDonald could not have maintained an action for his debt, nor McArthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different States.

In *Dickerman* v. *Northern Trust Co.* (176 U.S. 181, 190, 191, 192), decided in 1900, Mr. Justice Brown speaking for the defence said :

If the law concerned itself with the motives of parties new complications would be introduced into suits, which might seriously obscure their real merits. If a debt secured by mortgage be justly due, it is no defence to a foreclosure that the mortgagee was animated by hostility or other bad motive. . . . The reports of this Court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal Court, will not confer jurisdiction ; but if the conveyance appear to be a real transaction, the Court will not in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance.

The question of motive, therefore, could not be interposed to defeat the jurisdiction of the Court, supposing that the gift was outright, and suit brought by South Dakota was not on behalf of the donor, but by the State itself as owner of the bonds.

The title to the bonds is absolute.

On this question Mr. Justice Brewer, speaking for the majority of the Court, stated, ' Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the State as representative of individual owners, as in the case of *New Hampshire* v. *Louisiana* (108 U.S. 76), for they were given outright and absolutely to the State. It is true that the gift may be considered a rare and unexpected one. Apparently the Statute of South Dakota was passed in view of the expected gift, and probably the donor made the gift under a not

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 310).

unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds'.[1] But notwithstanding this fact and for the reason stated, Mr. Justice Brewer thus concluded this preliminary phase of the case: 'The title of South Dakota is as perfect as though it had received these bonds directly from North Carolina,' and on behalf of the Court, not merely on behalf of the majority, the learned Justice thus stated the question which confronted it: 'We have, therefore, before us the case of a State with an unquestionable title to bonds issued by another State, secured by a mortgage of railroad stock belonging to that State, coming into this Court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt'.[2]

With these preliminary matters out of the way the question of jurisdiction of the controversy arises, and the extent to which relief might be granted if the Court entertained jurisdiction of the case—a question, according to the view of the majority of the Court, to be considered first, separate and distinct from the fact whether the donor could or could not have brought suit, and second, whether the case as made out by the pleadings was justiciable. On these two points Mr. Justice Brewer, speaking in behalf of the majority, stated, 'Obviously that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the Federal Court of a State of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another State. The question of jurisdiction is settled by the status of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too, the subject-matter is one of judicial cognizance. If anything can be considered as justiciable, it is a claim for money due on a written promise to pay—and if it be justiciable does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual and by him sold or donated to the former'.[3]

The status of the donor is immaterial.

Having come to the conclusion that the bonds issued under the various acts were valid and the mortgages properly executed, that the title to the bonds and the mortgages was vested in the State of South Dakota by gift, whatever the motive of that gift may have been, and that the claim, for a payment of money involving a foreclosure of a mortgage, was justiciable, the court took up in detail and considered at length whether it should exercise jurisdiction in the case. And, as was inevitable where the question of jurisdiction was mooted by counsel, the court appealed to its past in justification of its present and proposed action. Therefore, in the very opening paragraph of this part of his opinion Mr. Justice Brewer made clear the attitude of the court, and indeed, had it not been for the insistence of counsel and division among the judges, the case could have rested upon it. Thus, he says:

Coming now to the right of South Dakota to maintain this suit against North Carolina, we remark that it is a controversy between two States; that by sec. 2,

The controversy is between States.

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 310).
[2] *Ibid.* (192 U.S. 286, 312).
[3] *Ibid.* (192 U.S. 286, 312).

art. III, of the Constitution, this court is given original jurisdiction of 'controversies between two or more States'. In *Missouri* v. *Illinois and the Sanitary District of Chicago*, 180 U.S. 208, Mr. Justice Shiras, speaking for the court, reviewed at length the history of the incorporation of this provision into the Federal Constitution and the decisions rendered by this court in respect to such jurisdiction, closing with these words (p. 240) :

'The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State.'[1]

To the statement of Mr. Justice Shiras, Mr. Justice Brewer added that 'the present case is one "directly affecting the property rights and interests of a State"'.

With this reference to the case of *Missouri* v. *Illinois*, and by reference incorporating it in its entirety, including the analysis of the nature and jurisdiction of the court and the numerous cases in which it assumed jurisdiction and decided controversies between the States, added to the positive statement of Mr. Justice Brewer that the present case fell within the precedents cited by Mr. Justice Shiras, the court had practically decided the question of jurisdiction raised in the case under consideration. But, however specific the reference may be, different opinions delivered in different cases are separate and distinct. Therefore, Mr. Justice Brewer, who was particularly interested in judicial settlement—having taken part in the decision of a number of controversies between the States, in which he rendered the opinion of the court, having participated as arbiter in the dispute between Great Britain and Venezuela, and having constantly attended the Lake Mohonk Conferences on arbitration, and elsewhere upon the public platform, confessed his faith in judicial settlement—was unwilling to let the occasion pass without a word of his own about the jurisdiction of the august tribunal of which he had the honour to be a member. Feeling, and therefore saying, that, because of the opinion of Mr. Justice Shiras in *Missouri* v. *Illinois*, a review of the subject was 'unnecessary', he nevertheless felt, and therefore he said, that 'two or three matters are worthy of notice'. And the two or three matters to which he modestly referred are well worth the saying. He wished it to be beyond reasonable doubt that a claim for money was justiciable, that it was in the minds of the framers of the Constitution, and that they therefore extended the judicial power to controversies of this kind. He also wished to have it made clear, for once and for all, that the 11th amendment, adopted because of dissatisfaction with the holding of the court in the Chisholm case, that an individual of one state might sue another one of the Union, left untouched the jurisdiction of the Supreme Court both as to the parties and as to the subject matter, except in the suits of individuals as such. On these two points the learned Justice said :

The original draft of the Constitution reported to the convention gave to the Senate jurisdiction of all disputes and controversies 'between two or more States, respecting jurisdiction or territory', and to the Supreme Court jurisdiction of 'controversies between two or more States, except such as shall regard territory or jurisdiction'. A claim for money due being a controversy of a justiciable nature, and one of the most common of controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court. In the subsequent revision by the convention the power given to the Senate in respect to controversies between the States was stricken out as well as the limitation upon

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 314).

the jurisdiction of this court, leaving to it in the language now found in the Constitution jurisdiction without any limitation of 'controversies between two or more States'.[1]

Precedents examined.

After invoking the authority of Mr. Chief Justice Marshall in *Cohens* v. *Virginia* (6 Wheat. 264, 406), which, as it were, has a fatal attraction for justices of the Supreme Court in considering their jurisdiction in controversies between States, but which is to the reader as a twice-told tale, and after quoting from that opinion, in which that great and learned judge held that 'If these [States] be the parties it is entirely unimportant what may be the subject of controversy', and 'Be it what it may, these parties have a constitutional right to come into the courts of the Union', Mr. Justice Brewer falls a victim to the case of *Rhode Island* v. *Massachusetts* (12 Peters, 657, 721), which apparently requires more ingenuity to avoid than even a Justice of the Supreme Court possesses. The reader cannot object to fall in company with Mr. Justice Brewer, and therefore the following passage, which that Justice quotes from the masterly and unanswerable opinion of Mr. Justice Baldwin in that case, is requoted :

> Those States, in their highest sovereign capacity, in the convention of the people thereof, . . . adopted the Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power, (6 Wheat. 378, 380) as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority ; as their agent for executing the judicial power of the United States in the cases specified.

And again to quote Mr. Justice Baldwin's opinion, as Mr. Justice Brewer did a second time :

> That it is a controversy between two States, cannot be denied ; and though the Constitution does not, in terms, extend the judicial power to *all* controversies between two or more States, yet, it in terms excludes *none* whatever may be their nature or subject.

The learned Justice then took up and considered some of the leading decisions on the subject : *United States* v. *North Carolina* (136 U.S. 211), in which the court took jurisdiction of an action by the United States against North Carolina to recover interest on bonds and decided the case upon its merits in favour of the United States ; *United States* v. *Texas*, in which the question of jurisdiction of the Supreme Court in a dispute between the United States, on the one hand, and a State of the Union, on the other, was raised, argued and decided, expressly approving the decision of the court in the action of debt brought by the United States against North Carolina ; *United States* v. *Michigan* (190 U.S. 379), which had just then been decided and in which Mr. Justice Peckham, delivering the unanimous opinion, stated that 'This court has jurisdiction of such a controversy, although it is not literally between two States, the United States being a party on the one side and a State on the other'. In due course the learned Justice was brought face to face with the case of *Hans* v. *Louisiana* (134 U.S. 1), from which it is difficult not to quote—a difficulty which he

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 314).

overcame, but upon which he could not refrain from commenting, and properly, because the statement made by the learned judge in the unanimous opinion of the court in that case might seem to cast doubt upon the jurisdiction of the court in the present controversy. With the following comment Mr. Justice Brewer took leave of this phase of the subject :

We are not unmindful of the fact that in *Hans* v. *Louisiana*, 134 U.S. 1, Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisholm* v. *Georgia*, but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the Eleventh Amendment according to its spirit rather than by its letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State. Without noticing in detail the other cases referred to by Mr. Justice Shiras in *Missouri* v. *Illinois, et al., supra*, it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another to enforce a property right. *Chisholm* v. *Georgia* was an action of assumpsit, *United States* v. *North Carolina* an action of debt, *United States* v. *Michigan* a suit for an accounting, and that which was sought in each was a money judgment against the defendant State.[1]

Question of execution considered.

But the objections heretofore considered were not the only ones against the acceptance of jurisdiction. There was one of a more far-reaching and more specious kind, which was calculated to cause the court to refuse the exercise of that jurisdiction which it might otherwise assume on the ground that it could not execute the judgement it might render against the defendant State, an objection which has been met and overcome from time to time from the case of *Chisholm* v. *Georgia* to the present and since the present case. But the answer of the court has invariably been that it is not to be presumed that a State of the Union will disregard the judgement of the Supreme Court, which that State, directly or indirectly, created and invested with the very power which counsel would now seek to withdraw from the court. In the present case the objection was likely to be brushed aside, because the property out of which the judgement could be satisfied was tangible. It could be seized, it could be sold, and by the judgement of the court title would pass to the purchaser, which could not be questioned in any court, State or Federal, in contradistinction from a judgement which might command the State to raise money by taxation, or to vacate territory to which it claimed title as a sovereign. In the one case the judicial power could be made effective by the enforcement of a decree, in the other case the judicial power could be made effective by public opinion. Mr. Justice Brewer thus raised the question and fairly stated the difficulty :

But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county or State is exempt from seizure upon execution because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes. *Meriwether* v. *Garrett*, 102 U.S. 472, 513. As a rule no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature.

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 318).

In *Rees* v. *City of Watertown*, 19 Wall. 107, 116, 117, we said :

' We are of opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only ; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important.'

The Court cannot order a tax to be levied.

See also *Heine* v. *The Levee Commissioners*, 19 Wall. 655, 661 ; *Meriwether* v. *Garrett, supra*.[1]

Not content with stating the general principle, the learned Justice proceeded to the reason underlying the principle, and laid bare the weakness of the court to those who always associate the sword with justice. In this connexion, he quoted with approval the case of *United States* v. *Guthrie* (17 Howard, 284), decided in 1854, in which an application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary ; and he thus made his own and that of his brethren as well a portion of the opinion of Mr. Justice Daniels in that case, in which that lord of dissent had the rare good fortune of delivering the opinion of the court :

The only legitimate inquiry for our determination upon the case before us is this : Whether, under the organization of the Federal government or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States ? This is the question, the very question presented for our determination ; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command ; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather under such an absence of all rule, would, if practicable at all, be administered, not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests.

It is undoubtedly true that execution naturally follows a judgement, for if it did not the decision of a court would be a word of advice to be transmuted by the executive into a command. But we do not make progress by repeating statements which are truisms under certain conditions, but which require those conditions in order that they may be truisms. As things now stand, the inferior does not command the superior, and a command lacks the essential condition of obedience, if it do not proceed from a superior to an inferior. In this more perfect Union the States are equal, and indeed without the recognition of equality the Union could not have been formed ; and in the society of nations there is not and there cannot be a superior without a destruction of the principle of equality upon which the society rests. We must be content to allow sentiment to grow in behalf of execution, remembering that it does not exist between States of the Union in matters affecting governmental

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 318–19).

functions. We must also remember that execution, however closely it may seem to be connected with judgement so as to be almost inseparable in modern thought, nevertheless was separate and distinct from judgement for centuries in the practice, if not in the theory, of Rome, that fertile mother of law and jurisprudence, until the State, in assuming the administration of justice, substituted itself for the private litigant and executed the judgement in his behalf instead of allowing him, as heretofore, to enforce the right, reduced to judgement, by the means at his disposal.

Relation between judgement and execution.

But to return to the matter in hand, and to allow Mr. Justice Brewer to state the relation between judgement and execution, where the State as a superior stands face to face with the individual, and therefore the inferior. Thus, he says :

Further, in this connection may be noticed *Gordon* v. *United States*, 117 U.S. 697, in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress power to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704) :

'The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. . . . Indeed, no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term ; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.'[1]

Re-enforcing the views of Chief Justice Taney by a reference to *In re Sanborn* (148 U.S. 222) and *La Abra Silver Mining Company* v. *United States* (175 U.S. 423, 456), both of which cases refer to and quote with approval the views of the Chief Justice, Mr. Justice Brewer thus states the difficulty and the duty of the court to consider it, although, for the reasons stated, it was not necessary to decide it, notwithstanding the fact that its discussion was relevant and, in view of the circumstances of the case, unavoidable :

We have, then, on the one hand the general language of the Constitution vesting jurisdiction in this court over 'controversies between two or more States', the history of that jurisdictional clause in the convention, the cases of *Chisholm* v. *Georgia*, *United States* v. *North Carolina* and *United States* v. *Michigan*, (in which this court sustained jurisdiction over actions to recover money from a State,) the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature ; on the other, certain expressions of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.[2]

The way out is then suggested in the succeeding paragraph, and in a further

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 320 .
[2] *Ibid.* (192 U.S. 286, 320–1).

paragraph the decision of the court in this very important and far-reaching case is announced :

In this case fore closure can be decreed.

There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State. That the State is a necessary party to the foreclosure of the mortgage was settled by *Christian* v. *Atlantic & North Carolina Railroad Company*, 133 U.S. 233. Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency, to be determined when, if ever, it arises. And surely if, as we have often held, this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property.

Decree accordingly.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400), (no interest being recoverable, *United States* v. *North Carolina*, 136 U.S. 211), and that the same are secured by one hundred shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the Marshal of this court, directing him to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.

And either of the parties to this suit may apply to the court upon the foot of this decree, as occasion may require.[1]

Dissentient opinion,

Mr. Justice Brewer's opinion, convincing as it was to a majority of the court, was nevertheless not convincing to a powerful minority. Four of the Justices of the Supreme Court dissented and concurred in the elaborate opinion of Mr. Justice White, now Chief Justice of the tribunal of which for many years he has been a dominating member.

based on the 11th Amendment.

For present purposes, it is sufficient to note that the one, although not the only ground of dissent, was that the assumption of jurisdiction in this case would be doing indirectly what the 11th amendment had forbidden from being directly done : that is to say, by summoning a State to the bar of the Supreme Court, to compel by process of law the performance of a promise embodied in a contract with a private person, which could not be put in suit by the other contracting party but which, by transfer to a State, became invested with a characteristic which it did not possess and which it could not possess without the consent of the State of North Carolina. The consequence would be, in the opinion of the minority, that any right of a justiciable nature which its possessor could not enforce in a court of justice, would subject the State, by means of transfer of such right to another State, to be sued and to have a judgement rendered against it in cases where the private suitor lacked, because of the 11th amendment, a judicial remedy.

In support of these views, Mr. Justice White referred to and quoted largely from the two cases of *New Hampshire* v. *Louisiana* (108 U.S. 76), decided in 1893, and

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 321–2).

Hans v. *Louisiana* (134 U.S. 1), decided in 1890, with both of which the reader is familiar. He also invoked the authority of a third case, *Smith* v. *Reeves* (178 U.S. 436), decided in 1900, which quoted and relied upon Mr. Justice Bradley's opinion in the latter case. But on one point the exact language of Mr. Justice White must be quoted in this connexion, inasmuch as it goes to the heart of the question and explains the view of the minority :

It is unquestioned on the record that the bonds given to the State of South Dakota and upon which its action is based were past due at the time of the gift, and that for more than twenty years prior to the gift the State of North Carolina had, by her legislation, held herself not bound to pay the same. That these facts were known to the State of South Dakota when it accepted the gift is shown. The makers of the gift could not transfer to the State of South Dakota rights which they had not. In other words, if when the gift was made that which was parted with was not susceptible and had never been susceptible of legal enforcement because not embodying a justiciable obligation against the State of North Carolina, the State of South Dakota could not, by the acceptance of the gift, acquire greater rights than were possessed by the transferer. I take it to be the elementary rule of public law that, whilst the contracts of a sovereign may engender natural or moral obligations, and are in one sense property, they are yet obligations resting on the promise of the sovereign and possessing no other sanction than the good faith and honor of the sovereign itself. These principles, as applied to the States of this Union, are the necessary resultant of the adoption of the Eleventh Amendment. It is not necessary to refer to opinions of publicists on the general subject, since this court—as to the States of the Union—has declared the doctrine so fully as to leave it no longer an open question in this form.[1]

Without seeking to detract from the force of this statement, it is only fair to the majority of the court to note that, no less solicitous than the minority in the matter of sovereign rights, Mr. Justice Brewer and those agreeing with him maintained jurisdiction and rendered a judgement on the ground that the 11th amendment had ceased to operate, because the claim, in becoming the property of South Dakota, had become a controversy between two sovereign States of the Union, in which the plaintiff appeared as a sovereign in behalf of its sovereign right to sue the equally sovereign State of North Carolina instead of appearing, as in the case of *New Hampshire* v. *Louisiana* (108 U.S. 76), in behalf of and as the agent of its citizen.

Therefore, the case of *South Dakota* v. *North Carolina* is not to be taken as overruling *New Hampshire* v. *Louisiana* (108 U.S. 76), or as questioning the soundness of *Hans* v. *Louisiana* (134 U.S. 1), for the case under consideration was not a suit by a citizen, as in the latter, nor did the State lend itself to the suit of a citizen, as in the former. The State appeared in its own behalf and its own interest. It is a fact, however, that the case of *South Dakota* v. *North Carolina* allows a State to submit a controversy to the Supreme Court which did not arise between it and the defendant State but between the State and the individual ; and while it does not appear to violate either the letter or the spirit of the 11th amendment, it undoubtedly does limit that amendment in the interest of the State. It is still true that an individual of one State may not sue another State of the Union, and that the State whereof that individual is a citizen may not invoke the judicial power, and thus summon a State of the Union to the bar of the Supreme Court in pursuance of the consent so to do contained in the Constitution. But the Court is not deprived of

[1] *State of South Dakota* v. *State of North Carolina* (192 U.S. 286, 341–2).

jurisdiction merely because the controversy constituting the cause of action, or the controversy between the States, originated in a claim of its citizen. The controversy gives jurisdiction, not the antecedents of that controversy.

But a State of the more perfect Union does not, in this regard, possess the power of a nation of the society of nations. Under the law of the Union it can only litigate in its own behalf, whereas, according to the law of the society of nations, a nation can litigate in behalf of its subject or citizen.

Gradual growth of the jurisdiction of the court.

The cases contained in the group beginning with *Louisiana* v. *Texas* (176 U.S. 1) and ending with *South Dakota* v. *North Carolina* (192 U.S. 286) show a marked growth in the exercise if not in the conception of the jurisdiction of the Supreme Court. Of the seven cases falling within this section only two relate to boundaries, and these two are different phases of the same boundary dispute between the States of Tennessee and Virginia. The usefulness of the court has been recognized, and a willingness to resort to it manifested in matters other than controversies regarding territorial limits. It was natural that, in a sparsely and largely unsettled country, there should be disputes as to jurisdiction depending upon territorial dominion, and as the charters of the colonies were made at a time when America was not merely a new but unexplored world, it was to be expected that disputes of this kind should arise. There were eleven such outstanding and unsettled at the date of the Constitution. One by one they were settled, frequently by resorting to the court, with the inevitable result of drawing to that tribunal cases which would not in first instance have been submitted to it, although the grant of judicial power is without limitations in the Constitution, or, as repeatedly stated in the opinions of the court, if all controversies are not included, none are excluded from the grant of judicial power.

Comments on the preceding cases.

With the opening up of the country, the conversion of the wilderness of the prairie into industrial and commercial centres, differences of opinion resulting in controversy appeared and found their way to the Supreme Court because of the confidence which its decisions had already inspired in matters of boundary. It was the desire for markets beyond its confines which caused Louisiana to file its bill against the State of Texas; it was the concern of Missouri for the health of its people that led it to summon Illinois as a defendant before the court lest the waters of the Mississippi should be polluted by that State; it was the insistence on the part of Kansas that the waters of the Arkansas, rising in Colorado and flowing through Kansas, should not be diminished and its people deprived of their accustomed use; it was a bill for accounting which the United States filed against Michigan; and it was an attempt to compel a State of the more perfect Union to live up to its obligations which justified South Dakota in appearing against North Carolina. The Supreme Court had broadened its jurisdiction, or rather, resort was made to a portion thereof untried if not unsuspected, because the interests of the people, and therefore of the States, were broadening, and the Supreme Court was seen to be an institution calculated to meet and to satisfy those needs when they resulted in controversy between the States.

The case of *South Dakota* v. *North Carolina* has an interest above and beyond the subject-matter of the litigation and of the jurisdiction of the court in the premises, as the power of the court to enforce its judgement was raised, discussed, and asserted in a judgement against a State as far as private as distinct from

public right was involved, and private as distinct from public property was within its reach. As in the case of *Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66), decided in 1860, so in the case of *South Dakota* v. *North Carolina*, decided in 1903, the court disclaimed any power to enforce a decision affecting the State in its corporate, political, or public capacity. In proceeding against the property of the State held in its private capacity, it drew a distinction between the act of the State as such, which an individual could not perform, and the act of a State which an individual could and does. Within the sphere of its sovereignty, and in the exercise of its sovereign powers, it is apparently regarded as beyond the reach of the court; within the sphere of private enterprise, and in the conduct of business such as an individual would undertake, the State may be subject to execution. The decision, therefore, in the case of *South Dakota* v. *North Carolina* paves the way for the case of *South Carolina* v. *United States* (199 U.S. 437), decided in 1905, holding that the State renounces its sovereignty and its sovereign immunity when it goes into business as a man of affairs.

IX.

TEN CASES INVOLVING BOUNDARY, RIPARIAN RIGHTS, PUBLIC HEALTH AND OTHER DISPUTES.

52. State of Missouri v. State of Nebraska.

(196 U.S. 23) 1904.

A boundary dispute,

The cases of *Missouri* v. *Nebraska* and of *Nebraska* v. *Missouri* (196 U.S. 23), decided in 1904, are controversies between two States of the Union concerning their boundaries. The claims of each, the nature of the pleadings, and the form in which the controversy presented itself to the Supreme Court are admirably set forth in the opening paragraphs of the official report, taken from the opinion of Mr. Justice Harlan, who delivered on this occasion the unanimous opinion of his brethren:

> This is a case of disputed boundary between two States of the Union.
>
> The suit was commenced by an original bill filed in this court by the State of Missouri against the State of Nebraska. The relief sought by the former State is a decree declaring its right of possession of, and its jurisdiction and sovereignty over, certain territory east and north of the center of the main channel of the Missouri River as it runs between the two States at the present time; that Missouri be quieted in its title thereto; and that the State of Nebraska be forever enjoined and restrained from disturbing Missouri in the full enjoyment and possession of said territory.
>
> The State of Nebraska, after answering, filed a cross bill asking a decree confirming the possession, jurisdiction and sovereignty of Nebraska over said territory; that the boundary line between that part of Missouri known as Atchison County and that part of Nebraska known as Nemaha County, be ascertained and established, and permanent monuments erected to indicate the location of such line; and that the State of Missouri be enjoined and restrained from disturbing the State of Nebraska in the full enjoyment and possession of said territory.
>
> The commissioners heretofore appointed to take the evidence have filed their report, and it is agreed that their findings of facts is correct. The case is before us upon questions of law arising out of the pleadings, the report of the commissioners, and the stipulation of the parties.[1]

[1] *State of Missouri* v. *State of Nebraska* (196 U.S. 23).

And the facts of the case as disclosed by the pleadings and the evidence filed by the report of the commissioners, accepted as correct by the parties litigant, are stated to perfection by Mr. Justice Harlan, with the ease, the grace, and the skill of a master-hand, in the opening paragraph of what may be called his opinion :

due to a sudden change in the bed of the Missouri River, 1867.

It is undisputed in the case that *prior* to July 5, 1867, the bed and channel of the Missouri River were substantially as they had been continuously from the date of the admission of the respective States into the Union, only such variations occurring during that entire period as naturally followed in the course of time from one side of the river to the other. But on the day just named, July 5, 1867 (which was after the admission of Nebraska into the Union), within twenty-four hours and during a time of very high water, the river, which had for years passed around what is called McKissick's Island, cut a new channel across and through the narrow neck of land at the west end of Island Precinct (of which McKissick's Island formed a part), about a half mile wide, making for itself a new channel and passing through what was admittedly, at that time, territory of Nebraska. After that change the river ceased to run around McKissick's Island. In the course of a few years, after the new channel was thus made, the old channel dried up and became tillable land, valuable for agricultural purposes, whereby the old bed of the river was vacated about fifteen miles in length. This change in the bed or channel of the river became fixed and permanent ; for, at the commencement of this suit it was the same as it was immediately after the change that occurred on the fifth day of July, 1867. The result was that the land between the channel of the river as it was prior to July 5, 1867, and the channel as it was after that date and is now, was thrown on the east side of the Missouri River ; whereas, prior to that date it had been on the west side.[1]

The question before the court was thus, whether the boundary between the two States followed the sudden and permanent change in the course and channel of the river on the 5th day of July, 1867, under the facts and circumstances stated by the learned Justice. In other words, whether a State, which admittedly has the benefit of the slow, gradual, and imperceptible change of a river and its banks by the natural process of accretion, is to maintain the benefit of a sudden, violent, and unmistakable change by avulsion of the course and channel of a river agreed upon as a boundary between it and the adjoining State or nation.

A case of avulsion.

The answer is not doubtful, and never has been since the days of the Roman law, which sums it all up in the maxim everywhere obtaining, *qui sentit commodum, sentire debet et onus* ; for a nation or state, claiming the benefit of accretion, cannot rightfully hope to appropriate the lands of its neighbour by avulsion. Certainly, after the decision of the Supreme Court of the United States in the case of *Nebraska* v. *Iowa* (143 U.S. 359), decided in 1892, the question could not be considered as doubtful ; and it was a forlorn hope, if indeed a hope, on the part of counsel for Missouri to insist that the act of Congress making the Missouri the boundary between the States meant, without an unequivocal expression to that effect, not to be found in the statutes, that the boundary between the States should follow the changeable and capricious course of that mighty river and of its shifting channel. Rather, the true rule is laid down by counsel for Nebraska, as follows :

Where the course of a river forming the boundary between States is suddenly changed by avulsion, the boundary remains unchanged. The findings of the commissioners and the evidence adduced before them show that the Missouri River between Missouri and Nebraska changed its course in a single day—July 5, 1867—and

[1] *State of Missouri* v. *State of Nebraska* (196 U.S. 23, 33–4).

left a large area of Nebraska land on the east side. This fact and the correctness of the findings of the commissioners are also established by stipulations of the parties.

The change having taken place in a single day, it is perfectly clear that no law applicable to accretion could have operated to transfer the territory in controversy from Nebraska to Missouri. The jurisdiction of those States and the status of the citizens do not fluctuate with every freak of the Missouri River. If they did, a large portion of the Nebraska population might go to bed at night in Nebraska and get up in the morning on the same spot in Missouri.

The rule applicable to the facts presented by the record has been stated by this court, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. *Iowa* v. *Nebraska*, 143 U.S. 361. . . .

The act of 1836, 5 Stat. 34, merely extends the boundary of the State of Missouri to the Missouri River upon extinguishment of the Indian title to the intervening land, and does not purport to change the rule of law that where the course of a river forming a boundary is suddenly changed by avulsion, the boundary remains unchanged. The act furnishes no foundation for complainant's argument that the shifting channel of the Missouri River, wherever it may be, whether changed by accretion or avulsion, is the eternal boundary line between Missouri and Nebraska. If the Missouri River should suddenly cut across the west end of Nebraska, complainant's theory would wipe Nebraska off the map and leave Missouri in possession of a vast empire acquired without regard to the rights of the inhabitants. No such conclusion is deducible from the enactment quoted.[1]

Although the law is as stated by counsel for Nebraska, it is advisable to refer to a case or two, because of the importance of the question to nations as well as States. Thus, in the case of *New Orleans* v. *United States* (10 Peters, 662, 717), decided by the Supreme Court in 1836, Mr. Justice McLean said, in behalf of that learned body:

The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.

And Mr. Justice McLean added, as pointed out by Mr. Justice Harlan, who quoted the passage in question, that:

This rule is no less just when applied to public, than to private rights.

While the rule of law thus stated is applicable to the present case, the very point had been raised and settled in the subsequent cases, with which the reader is familiar, of *Missouri* v. *Kentucky* (11 Wallace, 395), decided in 1870; *Indiana* v. *Kentucky* (136 U.S. 479), decided in 1890; and notably the more recent case of *Nebraska* v. *Iowa* (143 U.S. 359, 361, 367, 380), decided in 1892, in which Mr. Justice Brewer, speaking for a unanimous court, decided the very question in a case concerning the Missouri River and Nebraska. In the course of this opinion, which has already been quoted, he said:

The law of avulsion.

It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of

[1] *State of Missouri* v. *State of Nebraska* (196 U.S. 23, 32–3).

the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. . . .

These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel.[1]

Mr. Justice Brewer next adverts to the provisions of the civil law, and the authority of writers on the law of nations, found in the opinion of Attorney-General Cushing (8 Op. Attys. Gen. 75), from which he quotes the following passage :

The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two States the varying center of the channel, and that avulsion would establish a fixed boundary, to wit, the center of the abandoned channel.

Speaking of a sudden change on the part of the Missouri River in that portion of its course where it is the boundary between Nebraska and Iowa, Mr. Justice Brewer specifically and further said in the case of *Nebraska* v. *Iowa* :

This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel ; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

Because of these authorities, the court adjudged, to quote the language of Mr. Justice Harlan :

Judgement of court in favour of Nebraska.

That the middle of the channel of the Missouri River, according to its course as it was prior to the avulsion of July 5, 1867, is the true boundary line between Missouri and Nebraska.[2]

And because thereof, the original bill of Missouri was dismissed and a decree entered in favour of the State of Nebraska on its cross-bill.

53. State of Missouri v. State of Nebraska.

(197 U.S. 577) 1905.

After announcing the decree of the court in the preceding phase of *Missouri* v. *Nebraska*, Mr. Justice Harlan thus concluded his opinion, and foreshadowed further action in the case :

It appears from the record that about the year 1895 the county surveyors of Nemaha County, Nebraska, and Atchison County, Missouri, made surveys of the abandoned bed of the Missouri River, in the locality here in question, ascertained the location of the original banks of the river on either side, and to some extent marked the middle of the old channel. If the two States agree upon these surveys and locations as correctly marking the original banks of the river and the middle of the old channel, the court will, by decree, give effect to that agreement ; or, if either State desires a new survey the court will order one to be made and cause monuments to be placed so as to permanently mark the boundary line between the two States. The disposition of the case by final decree is postponed for forty days, in order that the court may be advised as to the wishes of the parties in respect of these details.[3]

[1] *State of Missouri* v. *State of Nebraska* (196 U.S. 23, 35–6).
[2] *Ibid.* (196 U.S. 23, 37).
[3] S.C. (197 U.S. 577–8).

Agreement of the parties upon the facts.

As counsel for the States in controversy had admitted the correctness of the facts embodied in the pleadings and the report of the commissioners adopting the surveys in question, it was to be expected that the suggestion of the court would be accepted and that they would ask that the boundaries between the two States be determined by the court in accordance therewith. This they did by their counsel on January 30, 1905, and inasmuch as the monuments marking the boundary line established by the surveyors were not of a permanent character and as many of them had become destroyed or removed, they deemed it best that 'permanent monuments be erected at regular intervals on said line in such manner as will quiet all dispute in reference to said boundary'.[1] They therefore asked that the commissioners appointed by the court be continued, that the monuments be placed under their supervision, and that their action be reported to the court for approval; that the commissioners receive compensation to be fixed by the parties, and, upon failure to agree, by the court; and that the commissioners be allowed until May 1, 1905, to make their report, because of the unfavourable condition of the weather during the winter and of the character of the ground during the spring.

Decree to mark the boundaries.

The request of counsel was approved and the court thereupon ordered, adjudged and decreed 'that the middle of the channel of the Missouri River, according to its course as it was prior to the avulsion of July 5, 1867, is and shall be the true boundary line between Missouri and Nebraska'; that the commissioners heretofore appointed cause permanent monuments to be placed, marking the boundary line thus decreed between the States, and that the final report of the Commissioners be presented to the Supreme Court on or before the 15th day of May, 1905.[2]

54. State of South Carolina v. United States.

(199 U.S. 437) 1905.

South Carolina takes control of the liquor trade.

The State of South Carolina, by various statutes, assumed control of the liquor business, not of its manufacture but of its sale, establishing dispensaries for the wholesale and retail sale of liquor and prohibiting sale thereof by other than the agents appointed by the State. The 'dispensers', as these agents of the State were called, had no interest in the proceeds of the sales, one-half of which were divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the State treasury.

The Revised Statutes of the United States provide that:

Congress imposes a tax on retail dealers in liquor.

No person shall be engaged in nor carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided. (Sect. 3232.)

Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five gallons at the same time, shall be regarded as a retail dealer in liquors. (Sect. 3244.)

Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person', as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person. (Sect. 3140.)

[1] *State of Missouri* v. *State of Nebraska* (197 U.S. 577, 578).
[2] *Ibid.* (197 U.S. 577, 618).

Claim that State agents are liable to tax.

The importance of the question involved in the case of *South Carolina* v. *United States* (199 U.S. 437), decided in 1905, was, as stated by Mr. Justice Brewer, who delivered the opinion of the court, ' whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors.[1]

The United States demanded the licence tax in accordance with the provisions of the internal revenue act, the dispensers filed the applications for the licences, and the State, sometimes in cash and sometimes by warrants on its treasury, paid the United States, without protest prior to April 14, 1901, when a protest by the State dispensary commissioner was made and filed with the United States collector of internal revenue at Columbia, South Carolina. No appeal or application for the repayment of the sums paid by the various dispensaries was made either by them or by the State to the Commissioner of Internal Revenue, as authorized by the Revised Statutes, Sections 3226, 3227, and 3228.[2]

The laws of South Carolina prohibited the sale of liquors by individuals other than the dispensers, and of the 373 special licence stamps issued by the United States internal revenue collector in that State, only 112 were to dispensers and 260 to private individuals. To recover the amounts paid for licence taxes by the dispensers, the State of South Carolina began three actions in the Court of Claims, where they were consolidated and a judgement entered for the United States, from which the State of South Carolina appealed to the Supreme Court of the United States.

Action by the State to recover taxes paid.

In the Court of Claims, Mr. Chief Justice Nott opened his opinion with a very interesting statement, showing the novelty, the importance of the case, and the facts and principles involved, saying :

This is believed to be the first case brought before a court in which a State has united in one undertaking an exercise of the police power with a commercial business. The exercise of the police power is by legislating and limiting the sale of intoxicating liquor ; the commercial business is that of buying and selling such liquors for profit ; the question involved is whether the dispensary agents of the State can be required to pay the special tax or license fee imposed on dealers in liquors by the internal-revenue laws of the United States.[3]

Judgement in the Court of Claims for the United States.

From the head-note in the case it appears that the Court of Claims held that ' If a State unites in one undertaking an exercise of the police power with a commercial business, the National Government can not be compelled to aid the operation of the police power by foregoing its constitutional right to lay and collect an impost or excise on the business part of the transaction ' ; that ' the Constitution contains no grant of power, express or implied, which authorizes the General Government to tax a State through its means and instrumentalities of government ; but an excise on the dealer is a tax upon the consumer ; and the exemption of the State from taxation extends no further than the functions belonging to a State in its ordinary capacity ' ; and that ' The principle which rules and guides in such cases is this : The exemption of sovereignty extends no further than the attributes of sovereignty '.[4]

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 447).
[2] *Ibid.* (199 U.S. 437, 438).
[3] 39 Court of Claims Reports, 257, 280.
[4] *State of South Carolina* v. *United States* (199 U.S. 437, 439 note).

Argument for the United States.

In the course of his argument before the Supreme Court, Mr. Henry M. Hoyt, then Solicitor-General for the United States, said :

The dispensary system is not a valid exercise of the police power, and the State has deliberately embarked in a commercial enterprise for the sole object of profit. . . . If the State's contentions are well founded, she may assume entire control of the manufacture and sale of liquors and tobacco without paying taxes ; she may import free liquors and drugs and cloths ; she may engage in any business whatever, under the police claim, on just as good grounds, and claim to be free of all Federal taxation. If some States chose to follow the lead of Australia or New Zealand, on the theory of the government ownership of land and leases to occupants in place of private ownership and title, the right of direct taxation also by the United States would fall before its claim. If one State could pursue these theories, all States could, and the result would be that the Federal power of taxation, both direct and indirect, would be destroyed. . . .

When a State enters into business as a corporator, it lays down its sovereignty so far. . . . This principle applies, however the State's business may be conducted, whether as member of a partnership or of a corporation or, as here, by the State acting alone and exercising an exclusive monopoly. The State chooses to step down from its sovereignty and must take the consequences. When the United States avails of the law merchant, it is bound by the rules of that law, notwithstanding its sovereignty. . . .

If a State embarks in the liquor business, it does so with the same consequences and subject to the same liabilities under the law as a private individual or an ordinary corporation ; the internal revenue taxes collected from the South Carolina dispensary system were therefore properly exacted.[1]

Judgement of the court in favour of the United States.

Mr. Justice Brewer, who, as has been stated, delivered the opinion of the court, first considered and eliminated the objection that the word ' person ', used in the Revised Statutes, did not apply to a State. If standing alone it might, but would hardly, have been doubtful ; but it was defined in the statute to ' mean and include a partnership, association, company, or corporation, as well as a natural person '. Doubt was therefore excluded, and, without referring to the many cases that might be cited, the case of the *Republic of Honduras* v. *Soto* (112 New York Reports, 310), decided in 1889, may be referred to as holding the very point in question. Mr. Justice Brewer, however, did not consider it worth while to quote an authority or to argue the question, inasmuch as it was the dispensers who applied for and received the licences and who sold the liquors. The question was not whether the dispensers applied for and received licences in order to sell liquor, but whether they, as agents of the State, could be taxed, because the taxation of an agent of the State is in effect a taxation of the State, and, as Mr. Justice Marshall said in the leading case of *M'Culloch* v. *Maryland* (4 Wheat. 316), the right to tax is the right to tax out of existence.

From this standpoint, the question is seen to be one of vast importance, and it might involve the existence of the State, if the dispenser were to be conceived as the agent of the State in its sovereign capacity. But not if the State, engaging in business, is to be considered as a private person and as having renounced the immunities of sovereignty in so far as the business is concerned.

The importance of the case lies in the fact that the United States is a Union of States, retaining their original sovereignty except in so far as they have divested

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 445–7).

themselves thereof or of its exercise by a direct grant or by necessary implication, that we have, therefore, two great spheres, separate and distinct, although the line of demarcation may at times be difficult to draw, in one of which each State is supreme, and in the other the United States. The unwarranted exercise of power by either within the sphere of the other disturbs the equilibrium of the States and the harmony of the system. This phase of the subject is thus briefly but clearly stated by Mr. Justice Brewer, who said :

A dual system of government.

We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons ; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each to its separate sphere is the peculiar duty of all courts, preëminently of this—a duty oftentimes of great delicacy and difficulty.[1]

The learned Justice might have added, had he had in mind the society of nations, that its court would of necessity occupy a like position and assume the same rôle, maintaining the rights of the society on the one hand and safeguarding the rights of its members on the other.

Although Mr. Justice Brewer spoke of the nation instead of a Union of States, and certainly could not be accused of sacrificing, even in theory, the former to the latter, he recognized that the Government of the United States was one of enumerated powers, with its necessary consequence that the powers not granted directly or by implication remained with the States. On the other hand, he recognized that a power enumerated and delegated by the Constitution to Congress ' is comprehensive and complete, without other limitations than those found in the Constitution itself ', a principle of interpretation applicable to the powers reserved by the States as well as to the powers granted by them, as he himself observed in delivering the opinion of the court in *Fairbanks* v. *United States* (181 U.S. 283, 288), decided in 1901.

The Constitution is, therefore, at once the grant and the measure of the powers granted. It means what its framers intended it to mean at the time that they framed it and the States adopted it, just as any convention of the society of nations means what the contracting powers meant it to mean when they ratified it, and is to be so interpreted and applied until the one is amended according to its terms or the other modified by consent of the parties. This principle, sound and unanswerable in itself, Mr. Justice Brewer thus stated :

Development of the Constitution.

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded.[2]

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 448).
[2] *Ibid.* (199 U.S. 437, 448–9).

As authority for this statement he appealed to the opinion of Mr. Chief Justice Taney in *Dred Scott* v. *Sandford* (19 Howard, 393, 426), decided in 1857 :

It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizens ; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

In interpreting this written instrument, we must bear in mind that the language used in the Constitution is to be understood in its natural sense, and, as Chief Justice Marshall pointed out in the case of *Gibbons* v. *Ogden* (9 Wheaton, 1, 188), decided in 1824, the framers of the Constitution are to be understood ' to have intended what they have said '. And it is also to be borne in mind that, in interpreting the Constitution, recourse is to be had to the common law, inasmuch as ' its provisions are framed in the language of the English common law, and are to be read in the light of its history ', as aptly stated by Mr. Justice Matthews in delivering the opinion of the court in *Smith* v. *Alabama* (124 U.S. 465, 478), decided in 1888.

Applying this conception of the Constitution and its interpretation in order to ascertain its exact meaning, ' we must ', Mr. Justice Brewer said, ' therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants.'[1] The learned Justice thereupon enumerates the grants, in order later to ascertain the extent of the power conveyed by them. Thus :

Text of the Constitution.

By the first clause of section 8 of Article I of the Constitution, Congress is given the ' power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States ; but all duties, imposts and excises shall be uniform throughout the United States.'

By this clause the grant is limited in two ways : The revenue must be collected for public purposes, and all duties, imposts and excises must be uniform through the United States.

The fourth, fifth, and sixth clauses of section 9 of Article I are :

' 4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

' 5. No tax or duty shall be laid on articles exported from any State.

' 6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another ; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.'

Article V of the Amendments provides that no one shall be deprived of ' life, liberty, or property, without due process of law '.[2]

These, Mr. Justice Brewer informs us, are the only constitutional provisions bearing definitely upon the subject, and upon them he thus comments :

It will be seen that the only qualifications of the absolute, untrammeled power to lay and collect excises are that they shall be for public purposes, and that they shall be uniform throughout the United States. All other limitations named in the Constitution relate to taxes, duties and imposts. If, therefore, we confine our

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 450).
[2] *Ibid.* (199 U.S. 437, 450–1).

inquiry to the express provisions of the Constitution there is disclosed no limitation on the power of the General Government to collect license taxes.[1]

It had been said by Mr. Justice Miller, in delivering the opinion of the court in *Ex parte* Yarbrough (110 U.S. 651, 658), ' that what is implied is as much a part of the instrument as what is expressed.' Passing to a consideration of matters which are implied, though not expressed, Mr. Justice Brewer himself says, speaking for the majority of the court :

Neither the States nor the Union can interfere with the other.

> Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it. . . .
>
> In other words, the two Governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers.[2]

After calling attention to the fact that this principle was laid down in the leading case of *M'Culloch* v. *Maryland* (4 Wheaton, 316), holding that the State had no power to impose a tax upon the operations of a national bank, and particularly applicable to federal agencies, the learned Justice showed that the converse was equally true, that the United States could not tax State agencies, quoting with approval the following language of Chief Justice Chase in the leading case of *Texas* v. *White* (7 Wallace, 700, 725), decided in 1868 :

> Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

For if the Government of the Union could tax at its pleasure the agencies of the States they might be destroyed, and with the indestructible States the indestructible Union would pass out of existence.

Mr. Justice Brewer also appropriately refers to the cases of *The Collector* v. *Day* (11 Wallace, 113), decided in 1870, in which it was held that Congress could not impose a tax upon the salary of a judicial officer of a State, and quoted with approval the following passage from Mr. Justice Nelson's opinion in that case :

> It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation ; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion ?
>
> If the State should step from its pedestal and compete with the man in the street, it would exempt not only the official of the State representing it as such in the

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 451).
[2] *Ibid.* (199 U.S. 437, 451–2).

exercise of its sovereignty as such, but every agent of the State would necessarily be exempt from taxation, as mentioned by the Solicitor-General in his argument before the court and as further illustrated by Mr. Justice Brewer in the following manner:

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co., No.* 1, 170 U.S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleo-margarine, and all other objects of internal revenue tax. If one State finds it thus profitable, other States may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system.[1]

Inasmuch as the Constitution provides, in Article IV, section 4, that the 'United States shall guarantee to every State in this Union a republican form of government', Mr. Justice Brewer thereupon asks a pertinent question, 'Would the State by taking into possession these public utilities lose its republican form of government?' to which he does not pause to reply:

Consequences of the State claim considered.

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.[2]

The consequences of such an extension of the police power, Mr. Justice Brewer thus states:

It might involve the crippling of the national revenues.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland* for a complete answer:

'But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 454).
[2] *Ibid.* (199 U.S. 437, 454–5).

state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, all are represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.'

In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State.[1]

Where is the line to be drawn? Preliminary to answering this question, which had to be answered if the case was to be decided, Mr. Justice Brewer premised:

We have seen that the full power of collecting taxes is in terms granted to the National Government with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the Constitution intend should be exempt?

As said by Chief Justice Nott in delivering the opinion of the Court of Claims in this very case, and quoted with approval by Mr. Justice Brewer:

Political conditions of the Constitution.

Moreover, at the time of the adoption of the Constitution there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plant of a body politic to take up the work of the individual or body corporate. The public suspicion associated government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention there were men who trembled at the power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's Amendments.

Upon this subject and its conception of the province of government, Mr. Justice Brewer thus comments:

Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it.[2]

So much for the political conceptions of the framers. Next as to the status of the common law, uppermost in their minds and in connexion with which the Constitution is to be interpreted. On this phase of the question, Mr. Justice Brewer says:

If we look upon the Constitution in the light of the common law we are led to the same conclusion. All the avenues of trade were open to the individual. The Govern-

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 455–6).
[2] *Ibid.* (199 U.S. 437, 457).

ment did not attempt to exclude him from any. Whatever restraints were put upon him were mere police regulations to control his conduct in the business and not to exclude him therefrom. The Government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals. Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a State would attempt to monopolize any business heretofore carried on by individuals.[1]

State monopolies not contemplated in 1789.

But the line is not yet drawn, although the principles are to control the hand that draws it, and almost unconsciously and casually Mr. Justice Brewer draws the line in the very next sentence of his opinion, which can indeed be amplified but not more clearly or correctly stated :

Nature of the tax.

Further, it may be noticed that the tax is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom.[2]

In such a case neither the property nor the instrumentality of the State is taxed, as neither could be without jeopardizing the existence of the indestructible State, as thus stated in another passage of the opinion of Mr. Justice Nelson in the case of *The Collector* v. *Day* (11 Wallace, 113, 125), from which Mr. Justice Brewer had already quoted with approval :

It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence.

Mr. Justice Brewer further refers to two decisions of the Supreme Court in which the same doctrine was held concerning different agencies of the States ; and as the subject is so important, not only in constitutional but in international law, these cases are mentioned and the passages quoted. In *United States* v. *Railroad Company* (17 Wallace, 322, 327, 332), decided in 1872, Mr. Justice Hunt said on behalf of the court :

The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal Government. . . .

We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 458). [2] *Ibid.* (199 U.S. 437, 458).

occupy with equal propriety. It would not in that action be an auxiliary of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position.

In the case of *Ambrosini* v. *United States* (187 U.S. 1, 8), decided in 1902, involving the question whether bonds required from licensees under the dram shop act of Illinois were subject to the Federal war revenue tax, Mr. Chief Justice Fuller, speaking for a unanimous court, said :

The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity, and we are of the opinion that they were, and that they were exempted as no more taxable than the licenses.

The conclusion to be drawn from this series of cases, and the line to be drawn between Federal and State sovereignty, is thereupon stated by Mr. Justice Brewer in the case at hand :

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.[1]

Only State governmental agencies are exempt from tax.

This distinction is further illustrated by a citation of cases decided in the State courts, and from two such State reports passages may be aptly quoted. In the case of *Lloyd* v. *Mayor* (5 N.Y. 369, 374), the court said :

The corporation of the city of New York possesses two kinds of powers, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty—the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual.

In the case of *Western Saving Fund Society* v. *City of Philadelphia* (31 Pa. St. 175, 183) the court declared, in holding that the city in supplying gas to the inhabitants acts as a private corporation and is subject to the same liabilities and disabilities :

Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant, does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 461).

For these reasons Mr. Justice Brewer, speaking for a majority of the court, thus affirmed the judgement of the Court of Claims:

Judgement of the Court of Claims affirmed.

Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor is not invalidated by the fact that they are the agents of the State which has itself engaged in that business.[1]

Dissenting opinion.

The opinion of Mr. Justice Brewer was the opinion of the court and upon it was based the judgement. It was, however, only the opinion and the judgement of the majority, for Mr. Justice White, Mr. Justice Peckham, and Mr. Justice McKenna dissented, and Mr. Justice White delivered the dissenting opinion in which the two concurred.

In the dissenting opinion the judgement in the case of *South Carolina* v. *United States* 'departs from a principle which has been recognized from the beginning, and, under the assumed necessity of protecting the taxing power of the Government of the United States, establishes a doctrine which, in its potentiality, strips the States of their lawful authority'.[2] But, on the other hand, the authority of the Government was threatened because, if an agency of a State might be taxed, an agency of the United States might, in similar circumstances, likewise be taxed, introducing confusion and its necessary consequences. In the language of Mr. Justice White, 'It does more than this, since the theory upon which the case is decided also endows the States with a like power to divest the Government of the United States of its lawful attributes. In other words, by the ruling and the reasoning sustaining it, the ancient landmarks are obliterated and the distinct powers belonging to both the National and State governments are reciprocally placed the one at the mercy of the other, so as to give to each the potency of destroying the other.'[3]

The dissenting Justice considered the question involved in the case to be 'whether these agents of the State, for the act of selling liquor belonging to the State, as agents of the State, under the authority of the State, can be subjected to a license for carrying on the liquor business, levied by the internal revenue laws of the United States'.[4] And he appeared to consider the act of South Carolina as an exercise of the police power inherent in the State, and of which it had not divested itself by the Constitution. But it is one thing, for the well-being of the community, for a State to prevent the sale and manufacture of liquor and to enforce the provisions of the Statute by agents of the State; it is another thing to go into the business of selling liquor. The court was unanimous on the point that, in the exercise of this power as such, the State was not amenable to the law of Congress and that the agent thereof would likewise be exempt, inasmuch as it would be, to all intents and purposes, the State itself. On

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 463).
[2] *Ibid.* (199 U.S. 437, 464). [3] *Ibid.* (199 U.S. 437, 464). [4] *Ibid.* (199 U.S. 437, 464).

this point Mr. Justice White said, and his opinion coincided with that of the majority, that 'It is not necessary to trace the want of authority of the United States to impose a license exaction on the agents of the State to an express provision of the Constitution, since the court has constantly held that the absence of authority in the Government of the United States to tax or burden the agencies or instrumentalities of a state government, and the like want of authority on the part of the States to tax the agencies or instrumentalities of the National Government, results from the dual system of government which the Constitution created, and that the continuance in force of such a prohibition is absolutely essential to the preservation of both governments.' [1]

But it is believed that the opinion of the minority and the judgement of the court safeguard the right of the State as a political unit and the exercise of its sovereign powers. Within that sphere the individual citizen may not enter, but when the State, leaving its preferred sphere, comes down to the plane of the citizen, doing what he does and competing with him in industry and commerce, there does not appear to be any compelling reason why the act of the State should be treated differently from the act of the individual, when each is the same. When the State elects to stand in the shoes of the citizen the foot may be pinched. As a State, and in the exercise of its functions as such, it is and should be exempt from taxation. As a man of affairs, and to the extent of its business transactions, it should be subjected to, not be above, the law; and it is in the interest of its people that this should be so.

There is, however, a difference of opinion on this question, both at home and abroad, just as there is a difference of opinion whether a diplomat, everywhere entitled to immunity, loses that immunity if he goes into business and to the extent of the business. This the opinion of the majority would confirm; this the opinion of the minority would deny.

It is believed that correct principle and sound doctrine are admirably combined and felicitously expressed by Mr. Chief Justice Marshall, who in delivering the opinion of the Supreme Court in *Bank of the United States* v. *Planters' Bank of Georgia* (9 Wheat. 904, 907) said as long ago as 1824:

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

55. State of Missouri v. State of Illinois.

(200 U.S. 496) 1906.

The first case of *Missouri* v. *Illinois* (180 U.S. 208), turned upon two points, whether, admitting the facts stated in complainant's bill, the Supreme Court could take jurisdiction of the controversy, and, admitting the jurisdiction, whether the facts as pleaded constituted a cause of action. The court, it will be observed, in the opinion delivered by Mr. Justice Shiras, was very careful to confine itself to

[1] *State of South Carolina* v. *United States* (199 U.S. 437, 464-5).

the question of jurisdiction and to the justiciable nature of the controversy, without expressing any opinion as to the facts, although a demurrer to an answer admits the truth of the facts properly pleaded, and the court would have been justified in so considering them as true. As, in controversies between individuals, the defendant is ordinarily allowed to answer if the demurrer is overruled, so and especially, in controversies between States, the defendant would be allowed to answer, notwithstanding the overruling of the demurrer. Counsel for Illinois availed themselves of the permission to file answers to the complaint of the State of Missouri after the demurrer they had interposed was not sustained by the court, and upon the facts made out by the pleadings, consisting of the complainant's bill and the defendant's answers, the second case of *Missouri* v. *Illinois* (200 U.S. 496) came before the Supreme Court and was decided by that body in 1906 in favour of the defendant, dismissing the bill without prejudice—that is to say, dismissing the bill upon the facts as then stated, and leaving the State of Missouri free to appear before the court at some subsequent time with evidence supporting its cause and justifying an injunction.

It will perhaps aid the reader if, to the decision of the court, the summary of the case of Missouri, contained in the official report, be here prefixed :

Dispute as to the facts.

The substantial purpose of the complaint is to subject the construction and operation of the drainage channel from the Chicago River at Chicago, southwestwardly to the Desplaines River at Lockport, a point immediately above Joliet, to the court's supervision, upon the charge that the method of construction and operation creates and constitutes a continuing nuisance, dangerous to the health of the people of Missouri ; and which if not restrained, results in the daily transportation, by artificial means, and through an unnatural channel, of large quantities of undefecated sewage, and of accumulated deposits in the harbor of Chicago, and in the bed of the Illinois River, which poison the water supply of the inhabitants of Missouri and injuriously affect that portion of the Mississippi River which lies within complainant's jurisdiction.

No attack is made upon the canal or artificial channel as an unlawful structure, nor is any attempt made to prevent its use as a waterway. Complainant seeks relief against the pouring of undefecated and unpurified sewage and filth through it by the artificial arrangements into the Mississippi River to the detriment of complainant and its inhabitants.[1]

Such was the contention of the complainant. The contention of the defendant, as stated in the answer, and in the opinion of the court apparently substantiated by the proof presented, was thus summarized in the official report :

Existence of nuisance denied by Illinois.

The water of the Illinois River at Grafton since the opening of the drainage canal, as disclosed by chemical and bacterial surveys covering a long period of time, is, if anything, in a better sanitary condition since the opening of the drainage canal than it was prior thereto.

The Illinois River at its mouth, from a sanitary standpoint, based upon chemical and bacterial analyses, is less polluted and less dangerous to health than is either the Missouri River or the Mississippi River, and the Illinois River, emptying into the Mississippi and Missouri Rivers, is contaminated and polluted by these two rivers, instead of contaminating and polluting the combined waters of the Mississippi and Missouri Rivers.[2]

After stating the facts as disclosed in the pleadings of plaintiff and defendant in the first case, and the overruling of the demurrer, Mr. Justice Holmes briefly touches

[1] *State of Missouri* v. *State of Illinois* (200 U.S. 496, 497). [2] *Ibid.* (200 U.S. 496, 510).

upon the jurisdiction of the court decided in the previous case, and thus states it in terms interesting to the States of the Union and to the nations of the society of nations :

Judgement of the Court in favour of Illinois.

The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful and that the danger must be shown to be real and immediate. The nuisance set forth in this bill was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it rose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt. But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence is to be approached.[1]

The learned Justice next takes up three matters of importance in order to show : first, that the commission of an act which might prove to be a nuisance was not forbidden by the Constitution of the United States, and, in support of this proposition, cites the leading case of *Pennsylvania* v. *Wheeling and Belmont Bridge Company* (13 Howard, 518), discussed in the first case, and the case of *Kansas* v. *Colorado* (185 U.S. 125), with the facts and holding in which the reader is familiar ; second, that the Congress of the United States could pass an act regulating the use of the waters of these navigable streams, inasmuch as the regulation of interstate commerce is, by the Constitution, vested in the Congress, and that in the present case Congress had not exercised the power with which it was vested ; and third, that the State of Illinois had authorized the construction of the drainage system, and that, in the absence of a constitutional prohibition, or legislation of Congress, the act of the State of Illinois in its sovereign capacity was not subject to the supervision of the equally sovereign State of Missouri, and that the exercise of the right of each sovereign was to be determined by the principles of law applicable to such cases. The language of the court on each of these points is especially important, because of the international bearings of the case, and Mr. Justice Holmes had the advantage which his predecessor did not have, of delivering the unanimous opinion of his brethren.

On the first point the learned Justice says :

No sovereignty is here violated.

The first question to be answered was put in the well-known case of the Wheeling bridge. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518. In that case, also, there was a bill brought by a State to restrain a public nuisance, the erection of a bridge alleged to obstruct navigation, and a supplemental bill to abate it after it was erected. The question was put most explicitly by the dissenting judges, but it was accepted by all as fundamental. The Chief Justice observed that if the bridge was a nuisance it was an offense against the sovereignty whose law had been violated, and he asks what sovereignty that was. 13 How. 581 ; Daniel, J., 13 How. 599. See also *Kansas* v. *Colorado*, 185 U.S. 125. It could not be Virginia, because that

[1] *State of Missouri* v. *State of Illinois* (200 U.S. 496, 517–18).

State had purported to authorize it by statute. The Chief Justice found no prohibition by the United States. 13 How. 580. No third source of law was suggested by any one. The majority accepted the Chief Justice's postulate, and found an answer in what Congress had done.[1]

As to the second point, the learned Justice thus speaks :

Congress could regulate the matter,

It hardly was disputed that Congress could deal with the matter under its power to regulate commerce. The majority observed that although Congress had not declared in terms that a State should not obstruct the navigation of the Ohio, by bridges, yet it had regulated navigation upon that river in various ways and had sanctioned the compact between Virginia and Kentucky when Kentucky was let into the Union. By that compact the use and navigation of the Ohio River, so far as the territory of either State lay thereon, was to be free and common to the citizens of the United States. The compact, by the sanction of Congress, had become a law of the Union. A State law, which violated it was unconstitutional. Obstructing the navigation of the river was said to violate it, and it was added that more was not necessary to give a civil remedy for an injury done by the obstruction. 13 How. 565, 566. At a later stage of the case, after Congress had authorized the bridge, it was stated again in so many words that the ground of the former decision was that ' the act of the Legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law '. 18 How. 421, 430.[2]

On the third point, and directly touching the case in hand, the learned Justice states :

but has not forbidden the act of Illinois.

In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which the State's conduct can be called in question is one which may be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by the rules explicitly or implicitly recognized. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 737. It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. The words of the Constitution would be a narrow ground, upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.[3]

In view of the express decision of the court in the first case of *Missouri* v. *Illinois*, and the language used by Mr. Justice Shiras on behalf of the majority of his brethren, it may seem that the facts stated by Mr. Justice Holmes were unnecessary, inasmuch as he was scattering grain, as it were, upon a field already sown. He himself was aware of this, but the international aspect of the case appealed very strongly to him

[1] *State of Missouri* v. *State of Illinois* (200 U.S. 496, 518).
[2] *Ibid.* (200 U.S. 496, 518–19).
[3] *Ibid.* (200 U.S. 496, 519–20).

as a justification for going over ground already covered ; and he had in mind the case of *Kansas* v. *Colorado* (185 U.S. 125), in which the international element was uppermost, and which was considered and decided by the court in the interval between the two cases of *Missouri* v. *Illinois*. The learned Justice thus met the objection, if any, which his brethren did not make, for the court was unanimous and thus obviates criticism on the part of the reader that he is familiar with the principles just laid down by the learned Justice :

The purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of the State. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between States. . . .

The Court will only act if the nuisance is clearly proved.

Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. See *Kansas* v. *Colorado*, 185 U.S. 125.[1]

As an illustration of the caution to be observed in cases of this kind, the learned Justice says :

It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity.[2]

And after calling attention to the fact that the practice of discharging refuse into the river is general, including that of Missouri, he reaches the conclusion that such action of the States is permissible and is only to be forbidden when the act is an abuse of a general practice. The line is to be drawn, to be sure, but it must be clear that the evil complained of was produced by the defendant State and that the complainant, by its discharges in the river above the point where the Illinois flows into the Mississippi has not contributed to the evil. The question thereupon becomes one of fact, for if the Mississippi from the juncture of the Illinois is not polluted, and its waters continue, as before, to flow in their accustomed purity or impurity, the case of Missouri falls of its own weight.

The difficulty before the court was very great in this part of the case, for it had to weigh and to strike a balance between the evidence of the plaintiff, tending to show a nuisance, and the evidence of the defendant, tending to negative it—a task for experts in sanitation rather than for experts in jurisprudence. But the court bent itself to the task, Mr. Justice Holmes stating on its behalf :

We have studied the plaintiff's statement of the facts in detail, and have perused the evidence, but it is unnecessary for the purposes of the decision to do more than

[1] *State of Missouri* v. *State of Illinois* (200 U.S. 496, 520–1). [2] *Ibid.* (200 U.S. 496, 521).

give the general result in a very simple way. At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretense that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois River in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said, without evil results. The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations have been disproved, and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.[1]

No perceptible nuisance is proved.

In the proof submitted by the State of Missouri, an increase in the death-rate from typhoid fever in St. Louis is alleged. A slight increase is admitted by the defendant, which maintains that the increase is due to causes other than those for which it is responsible. No case of an epidemic caused by infection at so remote a source on these facts was brought forward and the cases produced were controverted. On this phase of the case Mr. Justice Holmes uses language peculiarly susceptible of an international application, saying :

> The plaintiff obviously must be cautious upon this point, for if this suit should succeed many others would follow, and it not improbably would find itself a defendant to a bill by one or more of the States lower down upon the Mississippi.[2]

The court was in a position to test this phase of the case, because it had statistics before the opening of the canal in 1900 and the hearing of this case four years later, and, assuming that the increase was real, Mr. Justice Holmes, speaking for the court, was able to say :

No clear inference to be drawn from increased typhoid.

> Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stop at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause.[3]

A great deal of testimony was taken as to the survival of the typhoid bacillus on the voyage from Chicago to the Mississippi and the possibility of its detection. Counsel for both sides agreed that the detection in the water was not to be expected, and on this phase of the question Mr. Justice Holmes stated :

> It seems to be conceded that the purification of the Illinois by the large dilution from Lake Michigan (nine parts or more in ten) would increase the danger, as it now generally is believed that the bacteria of decay, the saprophytes, which flourish in stagnant pools, destroy the pathogenic germs. Of course the addition of so much water to the Illinois also increases its speed.[4]

It is a proverb that one story is good until another is told, and the tale of Illinois is quickly told by the learned Justice :

> On the other hand, the defendant's evidence shows a reduction in the chemical

[1] *State of Missouri* v. *State of Illinois* (200 U.S. 496, 522–3).
[2] *Ibid.* (200 U.S. 496, 523). [3] *Ibid.* (200 U.S. 496, 524). [4] *Ibid.* (200 U.S. 496, 525).

and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. . . . The defendants' experts maintained that the water of the Missouri is worse than that of the Illinois, while it contributes a much large proportion to the intake. The evidence is very strong that it is necessary for St. Louis to take preventive measures by filtration or otherwise, against the dangers of the plaintiff's own creation or from other sources than Illinois. What will protect against one will protect against another. The presence of causes, of infection from the plaintiff's action makes the case weaker in principle as well as harder to prove than one in which all came from a single source.[1]

Missouri also pollutes the stream.

So much for the contentions of the plaintiff, met and denied by the defendant, which might be set forth at much greater length without affecting the result and the reasons upon which the court thus delivered its opinion, per Mr. Justice Holmes, on the entire controversy then before it :

We might go more into detail, but we believe that we have said enough to explain our point of view and our opinion of the evidence as it stands. What the future may develop, of course, we cannot tell. But our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause.[2]

Bill dismissed without prejudice.

56. State of Louisiana v. State of Mississippi.

(202 U.S. 1) 1906.

It is often said that only cases are submitted to arbitration which would not produce war and that only cases of the same kind would be submitted to an international court of justice. It is difficult to meet this statement, because, when a dispute has been settled by a mixed commission or decided by a court of justice, it is impossible to say that it would have been the cause of war if not adjusted or adjudged. We know, however, that courts of justice have been a most potent force in keeping disputants from one another's throats, that litigation and contest of wit and ingenuity in the court room have, in the vast majority of cases, replaced the resort to fisticuffs and to combats with more dangerous weapons. Indeed, we are so accustomed to the appeal to the court and the settlement of disputes by judicial process that we forget the alternative in the success of the expedient, which at most leaves a sense of disappointment, perhaps of bitterness, in the mind of the defeated party but which does not disturb the peace and harmony of the community. Public opinion persuades the disputants to go to court, public opinion insists upon observance of the judgement ; for if public opinion did not do one or the other an angry litigant might relapse into barbarism and take the law into his own hands, and if public opinion did not support the marshal or the sheriff, the judgement of the court, if not voluntarily complied with, could not be executed. We live and die in an atmosphere of public opinion, and we are its slaves, not its masters.

Public opinion.

The case of *Louisiana* v. *Mississippi* (202 U.S. 1), decided in 1906, is an illustration of the wisdom of the Revolutionary statesmen who drafted the Constitution,

[1] *State of Missouri* v. *State of Illinois* (200 U.S. 496, 525–6).

[2] *State of Missouri* v. *State of Illinois* (200 U.S. 496, 526). For the final phase of this case see *State of Missouri* v. *State of Illinois* (202 U.S. 598), *post*, p. 425.

providing for a court of the States, and of the citizens of the States in convention assembled, who ratified that instrument, including the provisions concerning the court of the States and its jurisdiction.

A dispute as to jurisdiction over oyster beds.

In the waters adjoining the States of Louisiana and of Mississippi there are oyster beds, and, as is the wont of fishermen, they plied their calling and sought their catch wherever they found it, without worrying over questions of jurisdiction or stopping to inquire whether a particular oyster was in Louisiana or in Mississippi, provided it was in their catch. The people of the State, however, took a narrower view of the matter, and Louisiana passed laws against fishing in its waters, and Mississippi took like action. As the laws were not observed, the State of Mississippi, in 1902, authorized a system of patrol of the oyster waters alleged to be within its jurisdiction and the maintenance of patrol boats to sustain the oyster laws in its territory. In the same year Louisiana followed the example of Mississippi, and authorized the establishment of patrol boats and the maintenance of an armed patrol on the Louisiana waters, to protect its rights in the oyster beds.

Danger of armed conflict.

Matters had come to an extreme point. Bodies of armed men were likely to come into collision, but, fortunately, between them stood the Supreme Court to stay their hands. As Mr. Chief Justice Fuller, in delivering the unanimous opinion of the court, said :

> In view of the danger of an armed conflict, the oyster commissions of both States, in September, 1902, adopted a joint resolution establishing a neutral territory between the two States, pending the final decision by the Supreme Court of the United States in the boundary suit to be instituted, to remain a common fishing ground.[1]

Whereupon the State of Louisiana, by leave of the court, filed its bill against the State of Mississippi on October 27, 1902, to establish, in a judicial proceeding, instead of an armed conflict, the boundary between the two States in controversy.

The dispute, it will be observed, was one of jurisdiction, but the rightfulness of its exercise depended upon the boundaries of the two States, inasmuch as the jurisdiction of one State ended where the other began and the laws of neither could have extra-territorial effect. Were it not for the prolongation of the boundary of each State beyond the limit of its territory, and the claim to exercise jurisdiction within adjacent waters, the case would be one of an ordinary boundary dispute, in which the jurisdiction of the court was so well settled as not to be open to question, turning upon an interpretation of the treaties in point and the acts of Congress creating the territories and binding the States upon their admission to this Union of States. There is, however, a principle of law involved, not municipal but international, which gives the case an interest which it would not possess and justifies a fullness of presentation otherwise out of place.

Demurrer to the jurisdiction overruled.

Before referring, however, to these matters, it is proper to premise that to the bill of Louisiana, setting forth the facts involving the boundary dispute, and asking that it be determined and decreed in accordance with its contentions, the State of Mississippi, by leave of the court, filed a demurrer, which, by stipulation of the parties, was submitted for consideration on printed arguments. The demurrer was overruled, the Court holding that a justiciable controversy was made out by the

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 35).

bill in the sense in which that term was understood and construed by the court in a series of adjudged cases. Leave was, however, given to Mississippi to answer as defendant and to file a cross-bill as plaintiff in the case, setting forth the facts involved in the dispute as it saw them, and praying that the boundary between the two States be determined and decreed in accordance with its contentions. To the answer Louisiana filed a replication and to the cross-bill an answer denying in substance its allegations. Upon this state of the pleadings, the case came before the court for argument and decision, and after argument it was decided, it may be said in this place, in accordance with the contentions of the State of Louisiana.

History of the boundaries.

The vast stretch of territory to the west of the Mississippi River, of which the State of Louisiana formed but an insignificant part, was purchased by the United States from France in 1803 for the trifling sum of $11,250,000. The eastern boundary of the State was well known and recognized by the countries owning the territory at various times and by its neighbours. Upon its admission as a State that eastern boundary was enlarged by Congress.

Some knowledge of the treaties relating to that portion of Louisiana adjoining the mouth of the Mississippi and the Gulf of Mexico, and of the acts of Congress concerning the boundaries of the territory and the State is necessary to a correct understanding of the case and the decree of the Court in favour of the contentions of Louisiana that the approach to the boundaries between the two States was the body of deep water known as the Mississippi Sound, and that the boundary line separating Louisiana from territory further east and to the north of the Sound from that part of Louisiana to the south thereof should be marked by a line drawn through its mid-channel, as in the case of rivers separating adjoining States.

Treaty of 1716.

In the treaty of peace of February 10, 1716, between Great Britain, France, and Spain, Article 7 thus dealt with the boundary line between the dominions of Great Britain and France in the New World :

> That for the future the confines between the dominions of His Britannic Majesty and those of His Most Christian Majesty in that part of the world shall be fixed irrevocably by a line drawn along the river Mississippi from its source to the river Iberville, and from thence by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain to the sea.
>
> The line from the latter lake passes through the strait known as the Rigolets, continued through the northern part of Lake Borgne at the point where the Pearl River empties into it, and thence into the Mississippi Sound in order to reach the Gulf of Mexico eastwardly through the Mississippi Sound ; or, turning to the south, through the deep channel and highway of commerce between Cat Island on the north and east, admittedly belonging to Mississippi, and Isle à Pitre and the Chandeleur Islands, claimed and recognized as belonging to Louisiana. It should be mentioned in this connexion that, according to this treaty, England retained the port of Mobile and its river and everything east of the Rigolets.
>
> The Island of Orleans, formed by the river Iberville, Lakes Maurepas and Pontchartrain, the Rigolets, the Gulf of Mexico and the Mississippi river, remained the property of France.[1]

[1] Mr. Chief Justice Fuller in *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 42).

Therefore, a part of the waters of Lake Borgne and the Sound at that time separated the territory of Louisiana, then belonging to France, on the south, from the territory of another power on the north. In the treaty of February 10, 1763, between Great Britain, France, and Spain, Article 7 provides that :

Treaty of 1763.

> The boundary between the dominions of Great Britain and France on the continent of North America shall be irrevocably fixed by a line drawn along the middle of the river Mississippi from its source as far as the river Iberville ; thence by a line drawn along the middle of this river and of the lakes Maurepas and Pontchartrain to the sea ; and to this purpose the Most Christian King cedes in full right and guarantees to His Britannic Majesty the river and port of Mobile and everything which he possesses on the left side of the river Mississippi, except the town of New Orleans and the island on which it is situated, which shall remain to France.

It is important to note, in this connexion, that, by the secret treaty of August 15, 1761, between France and Spain, known as the family compact, the kings of those two countries formed an offensive and defensive alliance, the fundamental principle of which was that an attack upon one was an attack upon the other. They pledged themselves to regard the two countries as one and to act as if they were one, and each was to compensate the other for losses which might be incurred by their war in common against Great Britain and its allies.

Cession of Louisiana to Spain, 1763.

In pursuance of this family compact and secret agreement, France and Spain concluded the treaty of November 3, 1762, to carry its provisions into effect, by the terms of which Louisiana, including New Orleans, was ceded to Spain. The consequence was that Spain thus obtained possession of Louisiana and the island of New Orleans as defined by the 6th article of the treaty of February 10, 1763. When Napoleon Buonaparte became First Consul and undisputed master of France, he looked to the New World to redress the balance of the Old, as Canning would have phrased it, and by Article 3 of the treaty of St. Ildefonso of October 1, 1800, between the French Republic and the Kingdom of Spain :

Retrocession to France, 1800.

> H.C.M. promises and engages on his part to recede to the French Republick six months after the full and entire execution of the conditions and stipulations herein expressed, relative to H.R.H. the Duke of Parma, the colony or province of Louisiana, *with the same extent that it now has in the hands of Spain, and had while in the possession of France, and such as it ought to be in conformity with the treaties subsequently concluded* between Spain and other states.[1]

Cession to the United States, 1803.

By the treaty of March 30, 1803, the French Republic ceded to the United States the territory of Louisiana agreed to be receded by Spain to France in accordance with the third article of the treaty of St. Ildefonso, which article is incorporated as Article 1 of the treaty between the two Republics.

It is to be observed that Louisiana was not ceded but receded by Spain to France, and that therefore the eastern boundary was the boundary of the treaty of 1763, with the right of approach through the Mississippi Sound dividing the eastern portion of the Island of Orleans on the south, known as the Parish of St. Bernard, from the territory to the north and east of the Pearl River. It should be said, however, before leaving the treaty of 1803, ceding Louisiana to the United States, that not only the mainland passed but also the islands fringing the Louisiana coast and to

[1] Malloy, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers*, vol. i, p. 506.

which it laid claim, as is expressly stated in the opening clause of the first sentence of Article 2 of that treaty :

In the cession made by the preceding article are included the adjacent Islands belonging to Louisiana. . . .[1]

Adjacent islands included in the cession.

On this state of affairs, Mr. Chief Justice Fuller, speaking for a unanimous court, felt and was justified in saying :

There is nothing in any of these transfers to raise a doubt that the peninsula of St. Bernard was part of the Island of Orleans and that this Island of Orleans was in fact formed by the extension to the sea of the boundary line coming down though the middle of Lakes Maurepas and Pontchartrain and so finding its way to the sea by the deep water channel.[2]

Such being the case as found by the court, it would be proper to dismiss this phase of the subject and to consider whether the boundary line could be prolonged from Lake Borgne through the deep channel to the sea, as it undoubtedly would and could be in the case of a river, strait, or body of water separating nations. But it is advisable to pursue the subject further, in justice to Mississippi, inasmuch as that State claimed, by subsequent act of Congress, jurisdiction over some of the waters, islands, and Parish of St. Bernard, including the oyster beds in dispute, which otherwise would fall within the acknowledged jurisdiction of Louisiana.

Act of Congress, 1804.

After the cession of Louisiana, Congress passed an act approved March 26, 1804, dividing the vast territory into two parts, the material portion of which is thus worded :

That all that portion of the country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi Territory and on an east and west line to commence on the Mississippi river, at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a Territory of the United States under the name of the Territory of Orleans ; . . .

Section 12 of the act provided that :

The residue of the Province of Louisiana, ceded to the United States, shall be called the District of Louisiana . . .

On this act the Chief Justice thus comments :

Congress manifestly regarded the lands to the east, that were south of the Mississippi Territory, and which form the disputed area of to-day, as part of the original Island of Orleans, included in the treaty of April 30, 1803 ; and these were given to the Territory of Orleans, whose southeastern boundary was the original southeastern boundary of the Island of Orleans. At that date the Mississippi Territory did not extend south of the thirty-first degree of north latitude and its domain did not reach the shore of Mississippi Sound, so called.[3]

Act of 1811.

It was provided by the third article of the treaty of cession of April 30, 1803, that ' the inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages, and immunities of citizens of the United States '.[4] In pursuance of thus provision of the treaty Congress passed an act, approved February 20, 1811, ' to enable the people of the

[1] Malloy, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers*, vol. i, p. 509.
[2] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 42). [3] *Ibid.* (202 U.S. 1, 43).
[4] Malloy, *Treaties, Conventions, &c.*, vol. i, p. 509.

Territory of Orleans to form a constitution and state government, and for the admission of such State into the Union, on an equal footing with the original States, and for other purposes.' As material to the present purpose, that portion of the statute dealing with the eastern boundary of the State is quoted, after fixing the northern boundary of the State at the 33° N. Lat., where it intersects the Mississippi :

Islands within 9 miles included in Louisiana, 1811.

thence down the said river to the river Iberville ; and from thence along the middle of the said river and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico ; thence bounded by said Gulf, to the place of beginning : including all islands within three leagues of the coast. . . .

Upon this portion of the act the Chief Justice thus comments :

The eastern boundary thus described is a water boundary, and, in extending this water boundary to the open sea or Gulf of Mexico, we think it included the Rigolets [the strait connecting Lake Pontchartrain with Lake Borgne, leading to the Mississippi Sound and the Gulf of Mexico] and the deep water sailing channel line to get around to the westward.[1]

Louisiana made a State, and its boundaries enlarged, 1812.

By act of Congress approved April 6, 1812, the Territory of Louisiana was created a State, thus bounded, and, within a week thereafter, by act of Congress approved April 14, 1812, a strip of territory was added to the State, which does not change but rather strengthens the contention of Louisiana in this respect.[2] The territory added is described as ' Beginning at the junction of the river Iberville with the Mississippi river ; thence along the middle of the Iberville and of the river Amite and Lakes Maurepas and Pontchartrain to the eastern mouth of Pearl river ; thence up the eastern branch of the Pearl river to the 31st degree of north latitude ; thence along the said degree of latitude to the river Mississippi ; thence down the said river to the place of beginning, shall become and form a part of the State of Louisiana, and be subject to the constitution and laws thereof in the same manner and for all intents and purposes as if it had been included within the original boundaries of the said State '.[3]

Such were the boundaries of the State by act of Congress, and such they are at the present day, because no State, by Article IV, section 3 of the Constitution, can be deprived of its territory without its own consent, and Louisiana has never consented to any change in its boundaries. A subsequent statute of Congress could not grant territory with which it had parted, and the grants affecting Mississippi, whether consistent or inconsistent with the boundaries of Louisiana, were subsequent to the admission of that State to the Union. If consistent, they are to be taken as a confirmation ; if inconsistent, they are to be disregarded. By act of Congress approved May 14, 1812, passed to enlarge the boundaries of Mississippi Territory, it was provided :

Enlargement of Mississippi Territory, 1812.

that all that portion of the Territory lying east of Pearl River, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is hereby annexed to the Mississippi Territory.[4]

It is to be observed that this territory is to the east of the Pearl River fixed as the boundary of the State of Louisiana, and that, by virtue of this addition to its territory, Mississippi became a neighbour to the east and to the north of the channel leading from the eastern boundary of Louisiana to the east and to the Gulf of Mexico. By an act of Congress approved March 1, 1817, enabling the Territory of Mississippi to

Mississippi made a State, 1817.

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 43–4).
[2] *Ibid.* (202 U.S. 1, 44). [3] *Ibid.* (202 U.S. 1, 44). [4] *Ibid.* (202 U.S. 1, 45).

become a State of the Union, the boundary of the new State, where it reached the Sound at the mouth of the Perdido River, was continued ' thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river and Lake Borgne '.[1] It is to be observed that the boundary, drawn at a point six leagues from the shore, does not proceed due west but westwardly to the eastern boundary of Louisiana, as fixed by the junction of Pearl River and Lake Borgne. If this line were drawn due west or following the sinuosities of the southern coast of Mississippi it would include some of the islands three leagues from that portion of Louisiana composing the Island of Orleans, always recognized as a part of that Island, and indeed part of the Parish of St. Bernard, over which the State of Louisiana had always exercised jurisdiction, as did its predecessors. The line, therefore, was to be drawn, not due west or following the sinuosities of the coast of Mississippi bordering on the Sound, but westwardly in such a manner as to exclude the Parish of St. Bernard and the islands within three leagues of Louisiana ; and, as pointed out by the court, there is no consistency between the acts of Congress if this be done. On this portion of the case the Chief Justice thus comments in announcing the decision of the court upon this phase of the controversy :

and given all islands within 18 miles of its shore.

Apparent inconsistency of the acts reconciled.

The claim of Mississippi is that the disputed area is composed of islands, and as those islands are within eighteen miles of her shore, that they were given to her by the act of March 1, and the resolution of December 10, 1817. It is true there are some islands in that area, such as Grassy, Half Moon, Petit Pass and Isle à Pitre, all of which are between the deep water channel on the north and the main coast line of St. Bernard peninsula on the south.

The contention of Louisiana is that these islands were previously given to her by the act of April 6, 1812, more than five years prior to the admission of Mississippi, and that her title thereto, even if the acts were in conflict, is superior to that of the State of Mississippi ; and she also contends that the islands belong to her because they are south of the deep water sailing channel line, which she submits is the true boundary line between the two States. . . .

The contention of Mississippi is based upon an assumed inconsistence between the Louisiana and the Mississippi acts, but we think upon a true interpretation, in the light of the facts, that no such inconsistency can be imputed. The maps show that there is a chain, not of alluvial but of sea sand islands running from the west shore of Mobile Bay in the State of Alabama, westward to and inclusive of Cat Island in the State of Mississippi. This chain forms the southern boundary of Mississippi Sound, and the islands are all relatively the same distance from the shore of the States of Mississippi and of Alabama. . . . If Congress referred to these islands as being thus within six leagues of the shore, when the act creating the State of Mississippi was passed, it follows that there would be no conflict with prior existing boundaries of the State of Louisiana, particularly if the deep water sailing channel line be taken as the correct boundary between the States. . . .

It seems obvious to us that it was to this chain of islands that Congress referred when it admitted Mississippi into the Union, and that it had no intention whatsoever of giving Mississippi any claim of ownership in the sea marsh islands, which had been previously granted to the State of Louisiana.

We are of opinion that the peninsula of St. Bernard in its entirety belongs to Louisiana ; that the Louisiana Marshes at the eastern extremity thereof form part of the coast line of the State ; and that the islands within nine miles of that coast are hers, except as restricted by the deep water sailing channel regarded as boundary.[2]

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 45). [2] *Ibid.* (202 U.S. 1, 45–7).

This portion of the case may therefore be dismissed by quoting from the argument of counsel on behalf of Louisiana the various claims of that State, approved by the court, to the territory in dispute :

Louisiana's case summarized.

Louisiana's title to the disputed territory is confirmed by prescription, usucaption, acquiescence, and specific acknowledgment by the State of Mississippi.

The surveys of this territory were made by the United States Government about the year 1842 and all lands to the channel were credited to Louisiana.

Under the Swamp Land Acts of 1849 and 1850 all lands selected by Louisiana south of the channel were approved by the Government and portions of them were subsequently sold by Louisiana to individuals at different times down to 1894.

The disputed territory has always been subject to the sovereignty of Louisiana and has yielded taxes to her exclusively according to the assessments laid by her officers.

All of the Departments of the Government in interpreting the acts of Congress have accredited the disputed territory to Louisiana.

The State of Mississippi has recognized the disputed territory as being the property of the State of Louisiana, and her present boundary pretension is but a matter of recent creation after long years of recognition of, and acquiescence in, Louisiana's ownership and sovereignty.

It was only after the oyster fishermen of Mississippi by their wasteful system of fishing had either fished up or destroyed all of the Mississippi oysters of any value that these fishermen began to invade Louisiana waters in search of them. Until recent years the Louisiana fisheries were open to all, but are now closed to all except her citizens. It was the exercise of this right that incurred Mississippi's displeasure and brought about this suit. That State made no claim to the territory under the Swamp Acts and it was granted to Louisiana by the Government.

In 1839 a survey of the Mississippi coast was made pursuant to an act of its legislature. This survey and the report accompanying the same show the deep water channel and credit the territory south of it to Louisiana. The official maps made and supplied by the State to county officers pursuant to the acts of 1866 and 1871 are to the same effect. See also map published by the board of immigration and agriculture of Mississippi under act of 1882.

The doctrine of ownership by prescription is fully sustained by the writers on international law and by the decisions. Pradier-Fodéré, tome II, p. 337, citing and reviewing all the authorities ; the Delagoa Bay dispute, State Papers, vol. 66, 1874, 1875, p. 554 ; the Great Britain-Venezuela dispute, Moore's Int. Arb. vol. 5, p. 5017 ; *Keyser* v. *Coe*, 9 Blatch. 32 ; *Rhode Island* v. *Massachusetts*, 4 How. 638 ; *Missouri* v. *Kentucky*, 11 Wall. 403 ; *Kentucky* v. *Indiana*, 116 U.S. 511 ; *Virginia* v. *Tennessee*, 148 U.S. 522.

The Chief Justice had now, as it were, clear sailing, and he proceeds to the Sound and the deep channel thereof. From the decision of the court the Sound was recognized as the boundary between the Territory of Mississippi to the north and the portion of Louisiana to the south, known as the Parish of St. Bernard, and inasmuch as Cat Island, admittedly belonging to Mississippi, is separated by a channel of commerce from the Isle à Pitre, recognized by the decision of the court as belonging to Louisiana, it necessarily follows, if the principles of international law be applicable to sounds as well as to rivers and straits, that the boundary between the two States would be the channel of commerce, the mid-channel, or, to use a technical expression of German origin, the *thalweg* from the junction of Lake Borgne and Pearl River to the Gulf of Mexico through the Sound, and between Cat Island, on the one hand, and the Isle à Pitre and the Chandeleur Islands, on the other hand, belonging to

the State of Louisiana. This the court held in a portion of its decision of more than passing interest to foreign jurists. On this phase of the subject Mr. Chief Justice Fuller says :

Doctrine of the *thalweg*

If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

The term 'thalweg' is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled 'fairway' or 'midway' or 'main channel', the word itself has been taken over into various languages. Thus in the treaty of Lunéville, February 9, 1801, we find 'le Thalweg de l'Adige', 'le Thalweg du Rhin', and it is similarly used in English treaties and decisions, and the books of publicists in every tongue.

In *Iowa* v. *Illinois*, 147 U.S. 1, the rule of the thalweg was stated and applied. The controversy between the States of Iowa and Illinois on the Mississippi River, which flowed between them, was as to the line which separated 'the jurisdiction of the two States for the purposes of taxation and other purposes of government'. Iowa contended that the boundary line was the middle of the main body of the river, without regard to the 'steamboat channel' or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between States is the middle of the main channel of the river.

Mr. Justice Field, delivering the opinion of the court, said :

'When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream", as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi.'[1]

The Chief Justice admitted that the judgement which he had summarized related to navigable rivers, but on behalf of his brethren, he immediately added :

applied to arms of the sea.

We are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.[2]

The Chief Justice, however, was unwilling to have the opinion of the court rest upon the individual views of its members if authority could be found in their behalf, and he both found and produced the authority. He appeals in first instance to the writers on international law. Collecting and stating their views, he says :

Authority of publicists.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States ; but whenever there is a deep

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 49–50). [2] *Ibid.* (202 U.S. 1, 50).

water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. 1 Martens (F. de), 2d ed. 134; Hall, § 38; Bluntschli, 5th ed. §§ 298, 299; 1 Oppenheim, 254, 255.

Thus Martens writes: 'What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry.'

So Pradier-Fodéré says (vol. ii, p. 202), that as to lakes, 'in communication with or connected with the sea, they ought to be considered under the same rules as international rivers.'

He then invokes judicial decisions as follows:

In *Devoe Manufacturing Company*, 108 U.S. 401, the question at issue was in regard to the boundary line between New York and New Jersey under an agreement between the two States. The jurisdiction of the State of New Jersey was claimed 'to extend down to the bay of New York, and to the channel midway of said bay', and this court sustained the claim. See *Hamburg American Steamship Company* v. *Grube*, 196 U.S. 407.[1]

Finally, he turns to arbitral decisions, selecting from the many two of particular interest to the United States.

In the San Juan Water Boundary controversy between the United States and Great Britain, Emperor William I gave the award in favor of the United States, October 21, 1871, by deciding 'that the boundary line between the territory of Her Brittanic Majesty and the United States should be drawn through the Haro Channel'; and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister, and the British representative, the boundary line was said to be prolonged until 'it reaches the center of the fairway of the Straits of San Juan de Fuca'. The fairway was the equivalent of the thalweg.

Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the treaty of Ghent, the deep water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

So in the *Alaskan Boundary* case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line and included Wales Island, to the north of which the channel passed. This sustained the American contention in regard to the thalweg and the island lying south of it.[2]

Counsel for Mississippi contended, however, that the rule 'as to the flow of the mid-channel or thalweg of the river Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain expires by its own limitation when such midchannel reaches Lake Borgne, which in contemplation of the rule is the open sea, and part of the waters of the Gulf of Mexico'.[3] The record, however, as pointed out by the Chief Justice, showed 'that the strip of water, part of Lake Borgne and Mississippi Sound, is not an open sea but a very shallow arm of the sea, having outside the deep water channel an inconsiderable depth'.[4] Because of this, the Chief Justice stated, and the court held, that it could be considered as the territorial waters of the adjacent coast and that the nation or state claiming and properly

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 50–1).
[2] *Ibid.* (202 U.S. 1, 50–1) [3] *Ibid.* (202 U.S. 1, 51–2). [4] *Ibid.* (202 U.S. 1, 52).

exercising jurisdiction therein could appropriate to itself exclusive rights of fishing therein ; and he thus dealt with these questions :

Territorial waters.

The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester* v. *Massachusetts*, 139 U.S. 240 ; *McCready* v. *Virginia*, 94 U.S. 391.

In *Manchester* v. *Massachusetts*, the court said : ' We think it must be regarded as established that, as between nations, the minimum limit to the territorial jurisdiction of a nation over tide waters is a marine league from its coast ; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit ; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation ; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenues, exercise an authority beyond this limit.' [1]

It will be observed that the Chief Justice referred to but did not quote from *McCready* v. *Virginia* (94 U.S. 391), and it was not necessary to do so any more than it was to consider ' the breadth of the maritime belt or the extent of the sway of the riparian States ', which he very properly avoided as not involved in the controversy between the States. But for the purposes of the general reader and from the larger point of view which would substitute a convention of the society of nations for the Constitution of the more perfect Union, it is advisable to notice this subject, if only in passing. Article IV, section 2, of the Constitution provides that ' the Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States '. The meaning of this clause had been considered in the case of *Corfield* v. *Coryell* (4 Washington Circuit Court Reports, 371), decided by Mr. Justice Washington in the Circuit Court of the United States for Pennsylvania in 1825, and, curiously enough, in a case involving a statute of New Jersey, which reserved to inhabitants and residents of that State the right to gather oysters within its jurisdiction.

After stating that ' each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away ', Mr. Chief Justice Waite said, in delivering the unanimous opinion of the court in the case of *McCready* v. *Virginia* (94 U.S. 391, 395-6), decided in 1876, and involving the question whether the State of Virginia could prohibit citizens of other States from planting oysters within its jurisdiction when its own citizens have that privilege, and after quoting the clause of the Constitution :

Mr. Justice Washington, in *Corfield* v. *Coryell*, 4 Wash. C. C. 380, thought that this provision extended only to such privileges and immunities as are ' in their nature fundamental ; which belong of right to the citizens of all free governments '. And Mr. Justice Curtis, in *Scott* v. *Sandford*, 19 How. 580, described them as such ' as belonged to general citizenship '. But usually, when this provision of the Constitution has been under consideration, the courts have manifested the disposition, which this court did in *Conner* v. *Elliott*, 18 How. 593, not to attempt to define the words, but ' rather to leave their meaning to be determined in each case upon a view of the particular rights asserted or denied therein '. This clearly is the safer course to

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 52).

pursue, when, to use the language of Mr. Justice Curtis, in *Conner* v. *Elliott*, 'we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief.'

Following, then, this salutary rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free governments', but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.

The islands adjoining Louisiana and within three leagues from its shores were alluvial, and Mr. Chief Justice Fuller felt it advisable to refer to an authority, making it clear that islands of this kind belonged in a peculiar manner to the adjacent shores. He was fortunately able to invoke the great and the unquestioned authority of Lord Stowell, then Sir William Scott, in a case made as if it were for this very purpose. In *The Anna* (5 C. Rob. 373, 385) Sir William Scott said in the course of his decision:

Lord Stowell cited upon alluvial islands.

The capture was made, it seems, at the mouth of the river Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is, '*terrae dominium finitur, ubi finitur armorum vis*,' and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the main-land. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of 'no man's land', not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which, indeed, they are formed. Their

elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law. *Quod vis fluminis de tuo praedio detraxerit* and *vicino praedio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory.

If they do not belong to the United States of America, any other power might occupy them ; they might be embanked and fortified. What a thorn would this be in the side of America ! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river.

The Chief Justice also reinforced the opinion of his brethren by an apt reference to the coasts of Florida, the Bahamas, and the shores of Cuba. Thus he said, and with this the case may well conclude, decided, as it was in its entirety, in favour of Louisiana :

As to these particular waters, the observations of Mr. Hall, 4th ed. p. 129, are in point : ' Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with the land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water.'

He then states the specific case of the Archipiélago de los Canarios on the coast of Cuba, and says : ' In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt water lake, and that the boundary of the land of Cuba runs along the exterior edge of the bank.'

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary.[1]

Judgement in favour of Louisiana.

57. State of Louisiana v. State of Mississippi.

(202 U.S. 58) 1906.

In the second case of *Louisiana* v. *Mississippi* (202 U.S. 58)—the first dealt with the demurrer which Mississippi interposed to the complaint and appears not to be reported, although the demurrer was overruled—the controversy between the States was considered upon the pleadings, consisting of the complaint and replication of Louisiana to the answer of Mississippi, and the answer and cross bill of that latter State, together with the evidence submitted for the consideration of the court. After

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 52–3).

a careful and elaborate argument, Mr. Chief Justice Fuller, on behalf of the court, was able to announce :

Our conclusion is that complainant is entitled to the relief sought.[1]

The decree, however, was not thereupon entered and made a part of the opinion, as is ordinarily done. It was apparently held under advisement ; for although the opinion was delivered on March 5 the decree itself was entered on April 23, 1906. The case is separately entered in the official reports, although it immediately follows the elaborate case, to which it is a pendant, as it were, though a very important one, as it is the decree for which the other supplies the reason. The matter, however, was so thoroughly settled ; the decree was so completely a matter of course, that it was not delivered by the Chief Justice or by any Justice on behalf of the court. It is stated to be *per curiam*, and it is in its entirety as follows :

Decree in accordance with the opinion.

This cause came on to be heard on the pleadings and proofs and was argued by counsel. On consideration thereof it is found by the court that the State of Louisiana, complainant, is entitled to a decree recognizing and declaring the real, certain and true boundary south of the State of Mississippi and north of the southeast portion of the State of Louisiana, and separating the two States in the waters of Lake Borgne and Mississippi Sound, to be, and that it is, the deep water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass between Cat Island and Isle à Pitre, to the Gulf of Mexico, as delineated on the following map, made up of the parts of charts Nos. 190 and 191 of the United States Coast and Geodetic Survey, embracing the particular locality :

And it is ordered, adjudged, and decreed accordingly.

It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and citizens, be and they are hereby enjoined and restrained from disputing the sovereignty and ownership of the State of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map

And that the costs of this suit be borne by the State of Mississippi.[2]

A case of international law.

It is hardly necessary to call attention to the international aspect of the various phases of the case of *Louisiana* v. *Mississippi* which have been the subject of discussion. The facts of the case, to treat the different phases as a unit, were international in their nature, as they depended upon treaties to which Great Britain, France, Spain, and Portugal were parties before the United States came into being; thereafter France, Great Britain, Spain, and the United States were involved as contracting parties; and finally two States of the Union were in controversy, happily settled by a resort to the Supreme Court. The rules of law invoked were principles of the law of nations unconsciously applied perhaps to the waters of the Sound, although its waters do not seem to have been in dispute; consciously applied by the Court in deciding the quarrel between the two States of the American Union, and expressly declared by the tribunal to be applicable to nations as well as to the States in controversy. It may therefore be fairly said to be an international precedent and as bearing out the happy and truthful statement made by Mr. Chief Justice Fuller in delivering the opinion of the Court in the case of *Kansas* v. *Colorado* (185 U.S. 125), decided in 1902, that, ' sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand '.

[1] *State of Louisiana* v. *State of Mississippi* (202 U.S. 1, 58). [2] *Ibid.* (202 U.S. 58, 58–9).

58. State of Iowa v. State of Illinois.

(202 U.S. 59) 1906.

In the first case of *Iowa* v. *Illinois* (147 U.S. 1), decided in 1893, the Court decided that the boundary line between the two States was and is 'the middle of the main navigable channel of the Mississippi River', and as counsel of the two States then desired that the line be drawn in those portions of the River where the nine bridges spanned the Mississippi, the Court ordered that a commission of three be appointed upon suggestion of counsel to ascertain and designate the boundary line between the two States, to make a proper examination, and to delineate on maps the true line in accordance with the decree of the Court, and to report to the Court for its further action in the premises.

In the second case of *Iowa* v. *Illinois* (151 U.S. 238), decided in 1893, the Court set aside its order of March 7, appointing commissioners, and its order of April 10, 1893, approving the report of the commissioners ascertaining and marking the boundary line between the two States at the Keokuk and Hamilton bridge at Keokuk, Iowa, on the ground that the counsel for Illinois did not concur in the motion for the approval of the report of the commissioners as counsel for Iowa thought and as the Court believed they had. The Court also set aside its order of the same day for the same reason that the commissioners should proceed 'with all convenient speed' to determine and mark the boundary line at the remaining eight points where bridges crossed the river between the States.

Final decree by consent of the parties.

In the third and final case of *Iowa* v. *Illinois* (202 U.S. 59), decided in 1906, the Attorneys-General for the two States appeared at the bar of the Supreme Court and severally and jointly, as the report says, moved that body to vacate the proceedings had in the second case and the order of the Court in the first case directing the appointment of a commission to ascertain and designate the boundary between the States at the several bridges, and to enter as the final decree in the premises the first part of the decree had in the first case, namely, 'that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River at the places where the nine bridges mentioned in the pleadings cross said river'. The Court complied with the request of counsel, and the decree as requested was entered, thus terminating the controversy to the apparent satisfaction of the litigating States.

The three cases of *Iowa* v. *Illinois* admit of the single and the very brief comment, that when a Court exists to which the States may resort in an acute controversy they do so, and that when the general principle has been laid down they are upon reflection satisfied with it without insisting that it be executed, inasmuch as the settlement of the principle carries with it the settlement of the controversy and makes further proceedings unnecessary.

59. State of Missouri v. State of Illinois.

(202 U.S. 598) 1906.

The State of Missouri has thrice appeared against the State of Illinois in the Supreme Court of the United States, setting forth facts in the first case to establish

a nuisance because of the deposit of the sewage of Chicago in the Mississippi in that portion of the river serving as a boundary between the two; in the second case offering evidence to make good its complaint, which evidence was found by the court, after profound study and prolonged examination, not to substantiate the cause of action alleged by the State of Missouri. The third case, *Missouri* v. *Illinois* (202 U.S. 598), presented to the court in 1905 and decided in the course of the succeeding year, is the aftermath of a law suit; for, whether the dispute be between individuals or States, costs are involved and must be paid. The costs in question were:

A question of costs.

$5,650	paid to the special commissioner.
$3,776.37	for taking down and transcribing the testimony of defendant's witnesses, etc.
720	Solicitor's fees, viz., $20 for attendance at final hearing and $2.50 for each deposition taken and admitted in evidence, in accordance with Rev. Stat. § 824.
$10,146.37	total. The plaintiff objected to the allowance and the Clerk referred the matter to this court.[1]

Two questions were involved: first, whether costs should be taxed in this case at all; and second, if allowed at all, whether the item of $720 was a proper charge.

Mr. Justice Holmes delivered the opinion in this, the third and final, as he did in the second phase of the case, and as the question is one of business the opinion is businesslike. On the allowance of costs in the controversy between two sovereign States of the more perfect Union, the learned Justice briefly, pointedly, and somewhat dryly said:

Costs allowed to Illinois.

The power of the court to allow costs is not disputed. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 460. The former decree in this case allowed them, and in the stipulation for the appointment of a special commissioner the parties agreed that the costs should be 'taxed by the court on the final disposal of the case, to be paid in such manner as the court may at that time determine.' But it is said that it is inconsistent with the dignity of a sovereign State to ask for costs; that in boundary cases costs have been divided, and that the suit was not for a pecuniary interest, but only the performance of the duty of a sovereign to its citizens, for which no costs should be imposed.

So far as the dignity of the State is concerned, that is its own affair. The United States has not been above taking costs. *United States* v. *Sanborn*, 135 U.S. 271. As to the supposed rule in boundary cases, it is not absolute. But in many cases of that kind both parties are equally interested to have the boundary settled, and whichever State begins the suit both equally are actors. Thus counter-relief was asked by the defendants in *Nebraska* v. *Iowa*, 143 U.S. 359, and *Missouri* v. *Iowa*, 160 U.S. 688. As to the nature of this suit, plaintiff alleged serious pecuniary damage to itself by the deposit of great quantities of filth upon the portion of the bed of the Mississippi alleged to belong to it, and, in short, framed its bill like any ordinary bill by a private person to restrain a nuisance. The chief difference was in the size of the nuisance. There is no indication that the defendants desired or needed the determination of this court, as States well might when their jurisdiction was in doubt. So far as this point is concerned, there is no reason why the plaintiff should not suffer the usual consequence of failure to establish its case.[2]

[1] *State of Missouri* v. *State of Illinois* (202 U.S. 598, 598–9).
[2] *Ibid.* (202 U.S. 598, 599–600).

The opinion of the learned Justice on the allowance of the item of $720 for solicitor's fees was even briefer :

The words of the statute [Rev. Stat. Sec. 824] are broad enough to embrace the testimony, unless they are taken very strictly, and the trouble to the parties in having to visit different places was similar to that caused by the taking of depositions adverted to by Judge Treat in *Strauss* v. *Meyer* (22 Fed. Rep. 467). The case is quite distinct from that of testimony taken in court and reduced to writing by the reporter. We are of opinion that the item may be allowed.[1]

The motion for costs prevailed and a precedent was made between the States for the payment of costs, not in equal moities, but by the sovereign plaintiff failing to establish its case against a sovereign defendant.

60. State of Kansas v. United States.

(204 U.S. 331) 1907.

In the opening paragraph of his opinion, which is also the opinion of the Court in the case of *Kansas* v. *United States* (204 U.S. 331), decided in 1907, Mr. Chief Justice Fuller said : ' On April 30, 1906, the State of Kansas applied for leave to file a bill of complaint against the United States and others, to which the United States objected on the ground of want of jurisdiction. May 21 leave was granted, without prejudice, and the bill was accordingly filed. As such an application by a State is usually granted as of course, we thought it wiser to allow the bill to be filed, but reserving to the United States the right to object to the jurisdiction thereafter, and hence the words, "without prejudice", were inserted in the order. October 9 leave was granted to the United States to file a demurrer, and in lieu of this a motion to dismiss was substituted, which was submitted November 12 on printed briefs on both sides.' [2]

A suit against the United States.

The case of *Kansas* v. *United States* has more than ordinary interest because, on the pleadings at least, it seems to be a suit on the part of Kansas against the United States. It was so considered by the Court, which was apparently inclined not to grant leave, as is done in ordinary cases, to file a bill against a State as defendant, but, desiring the question to be argued, leave was granted to file the bill apparently in order that the United States might be heard and the question determined whether the United States, like a State of the Union, could be made a party defendant without express consent as a State of the Union may be because of the general consent given in the Constitution to be sued. On a motion to dismiss substituted for the demurrer originally interposed by the United States, the case was submitted on printed briefs. It may be said at once, before considering the case made by the bill of complaint filed by Kansas, that on a consideration of its merits the Court held that Kansas was not the real party plaintiff but had only lent its name to certain railroad companies in whose behalf it appeared. On this ground, therefore, the case could have been dismissed, inasmuch as even supposing the State of Kansas could sue the United States, railroad companies, instead of the State, were in reality plaintiffs and unable to sue either the United States or a State of the American Union.

Recognizing the advisability of standing upon two legs the Court, irrespective of the merits of the case, squarely decided that the United States could not be sued

[1] *State of Missouri* v. *State of Illinois* (202 U.S. 598, 600).
[2] *State of Kansas* v. *United States* (204 U.S. 331, 337).

without its consent and that it had not consented to be sued in this case. The controversy, therefore, is of more than passing interest. Under the first heading it may be said, without going into details, that an Act of Congress, approved July 25, 1866, granted lands to the State of Kansas ' to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red River ', and that on the next day a further Act of Congress was approved to the same effect, ' to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph Company, from Fort Riley, Kansas, to Fort Smith, Arkansas '. This latter Act granted to the State of Kansas, ' for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile.' It was specifically stated in Section 3 that the lands therein granted ' shall inure to the benefit of said company ' and, upon the certificate of the Governor of the State of Kansas that any section of ten consecutive miles of the road was completed as provided by the Act, the Secretary of the Interior was to issue patents to the company ' for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted '. By Section 8 of the Act the Southern Pacific Railroad Company was authorized to extend and to construct its railroad beyond Kansas, passing through the Indian Territory ' with the consent of the Indians, and not otherwise ' to Fort Smith in the State of Arkansas, and a right of way was granted through the Indian Territory whenever the Indian title to the land required for this purpose should be extinguished by treaty or otherwise.[1] The bill set forth that the road was constructed in Indian Territory through lands no longer claimed or occupied by the tribe as a nation and that some of the lands had been allotted in severalty to individuals of the Creek Nation, and because of these facts the bill alleged that the lands passed to the State under the provisions of the Act of Congress authorizing the construction of the railroad and granting land to the State of Kansas in order to aid its construction. On this part of the case the bill prayed a decree of the Court adjudging to the State as trustee for the railway company the lands to which it claimed to be entitled in the Indian Territory, that the persons to whom they were allotted be directed to surrender possession thereof to the State as trustee, that they be enjoined from disposing of the lands, or, if the Court should be of the opinion that the persons to whom they were allotted and those claiming under them should not be disturbed, that an account be taken of the lands in controversy, and that the United States be adjudged to pay to the State as trustee the value of such lands, estimated at more than ten million dollars.

Congress grants land to the State for railroads, 1866;

the benefit of the land to go to the company.

The State claims certain lands under the Act of Congress

as trustee for the railway company.

On this statement of facts the Court found no difficulty in holding that the State was only a nominal party and that the real party in interest was the railroad company, that the issue of patents not to the State but directly to the company ' made the State nothing but a mere conduit for the passage of the title ', that if title passed to the State it would only be a trustee of the bare legal title, inasmuch as the railroad company would derive the entire benefit and the State take nothing from the grant, and that in cases where the title passed directly to the railroad company as in this case the Supreme Court had held the title to vest absolutely in the railroad company.[2]

The Court hold that the State is only a nominal party.

[1] *State of Kansas* v. *United States* (204 U.S. 331, 339). *Ibid.* (204 U.S. 331, 340).

In regard to the lands in Indian Territory the case was even clearer, for if any present grant were made it was, as Mr. Chief Justice Fuller said, certainly not to the State of Kansas, since the territory alleged to be granted was beyond the jurisdiction of Kansas. The grant was to Kansas to aid that State in the construction of the railroad, and, in the opinion of the Court, it could only apply to that part of the railroad built in the State, within which it exercised jurisdiction and had the right to construct it, not beyond its confines in which it did not possess jurisdiction and could not as of right construct the railroad. 'In these circumstances', Mr. Chief Justice Fuller said, 'we think it apparent that the name of the State is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction cannot be maintained.'[1] The decision of the Court on this phase of the case is in strict accordance with *New Hampshire* v. *Louisiana* (108 U.S. 76), decided in 1883, which held that the State could not appear in behalf of its citizen, although in the case of *South Dakota* v. *North Carolina* (192 U.S. 286), decided in 1904, the Court held that a State could sue in its own behalf even although its title were a gift from its citizen who could not himself invoke the original jurisdiction of the Supreme Court.

Jurisdiction denied.

So much for the plaintiff. Next, as to the defendant, for although other parties were joined with the United States as defendants the Court was of the opinion that the United States was the real party in interest and as such could not be sued without its consent. In order to show that by the bill itself the United States was the real party in interest Mr. Chief Justice Fuller said: 'In the present case the parties defendant other than the United States and its officers are Creek Indian allottees and persons claiming under them, and if their allotments should be taken from them, which is a part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, while the bill prays in the alternative that "in the event that from any equitable considerations the Court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the land in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values".'[2] As to the principle by which it may be determined whether a State, in this particular instance the United States, is the party at interest, Mr. Chief Justice Fuller relied upon the case of *Minnesota* v. *Hitchcock* (187 U.S. 373, 387), decided in 1901, and quoted with approval the following passage from the opinion of Mr. Justice Brewer, delivering the unanimous judgement of the Court in that case: 'If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgement or decree which may be rendered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgement or decree which can be entered.'

The question of jurisdiction, it cannot be too often said, is fundamental in a court of limited jurisdiction, and especially, it is to be observed, in suits of this kind; for the court cannot go beyond the statute creating it, and the cases are of no ordinary

[1] *State of Kansas* v. *United States* (204 U.S. 331, 341). [2] *Ibid.* (204 U.S. 331, 341–2).

kind. The Supreme Court of the United States is mindful of the fact that, in the exercise of original as distinct from appellate jurisdiction, it is a tribunal of limited powers, and it appears to be on its guard not to step beyond the grant of judicial power, lest by so doing it should not only commit an injustice but jeopardize the great experiment.

In the course of this narrative this question has been dwelt upon, and occasion is taken, because of the case at hand, in which that question was raised, to invite particular attention to it. It will perhaps be recalled that, in the case of *United States* v. *North Carolina* (136 U.S. 211), decided in 1890, involving a suit of the United States against one of the States of the Union, the question was not mentioned; yet Mr. Justice Harlan stated, in *United States* v. *Texas* (143 U.S. 621), decided in 1892, —a case involving the same principle and in which it was raised and debated by counsel—that the justices had considered among themselves in the former case, whether the court had jurisdiction before entertaining the suit.

In the case of *Minnesota* v. *Hitchcock* (185 U.S. 373, 387), to which Mr. Chief Justice Fuller referred, and from which he quoted a portion of the opinion of the court, the question of jurisdiction was discussed by Mr. Justice Brewer on behalf of the court in the opening words of his opinion, although the question was not raised by counsel. Indeed, it was perhaps unnecessary to discuss it, inasmuch as Congress had authorized by special statute a State to bring suit against the Secretary of the Interior, representing the United States, to determine title to school lands within an Indian reservation or a cession of lands within the State to which an Indian tribe laid claim. Thus, Mr. Justice Brewer said:

> A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject-matter.

After quoting the clause of the Constitution extending the judicial power to controversies ' to which the United States shall be a Party ', the learned Justice, notwithstanding the fact that, in the case before him, the United States was not a party to the record, says that it was one to which the United States could be regarded as a party, and, such being the case, that it is one to which the judicial power of the United States extends. He then says:

> It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.[1]

That is to say, in his opinion, which was in this instance the opinion of the court, the United States could be plaintiff or defendant in a suit provided the subject-matter were justiciable; but that does not, of course, settle the question whether the United States could be made a party defendant. This phase of the question the learned

[1] *State of Minnesota* v. *Hitchcock* (185 U.S. 373, 384)

Justice considers and covers in telling and happy phrase, within the compass of a single paragraph, saying:

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.[1]

But the Constitution decides the whole matter for the States of the Union, because they made the Constitution, they created the court, and they consented to be sued by Section II, Article 3 thereof. Their consent was free and apparently unlimited, except that the subject-matter in dispute should be justiciable. They did not decide the question as far as the agent of their hands was concerned. It probably did not occur to them, else they would have expressed an opinion one way or another. They took, however, the first step by deciding that the United States could be a party to a suit by extending the judicial power to controversies to which the United States shall be a party, and by this general expression the United States could be either plaintiff or defendant. But the Constitution does not, in express terms, extend the judicial power to controversies between the United States and a State, although it does to those between two or more States. Hence, the States are held to have given both a general and special consent to be sued in the Supreme Court in controversies between them, whereas, in the case of the United States, a general consent is lacking and special consent must be granted by statute, which, however, might, although it has not yet done so, be in general terms.

To revert to the case of *Kansas* v. *United States*, and to quote the language of Mr. Chief Justice Fuller:

The United States can only be sued with its own consent.

We are not dealing here with the merits of the controversy raised by the bill, but solely with the question of the original jurisdiction of this court. And as the United States has not consented to be sued, it results on this ground also the bill must be dismissed.[2]

61. State of Kansas v. State of Colorado.

(206 U.S. 46) 1907.

In the first phase of *Kansas* v. *Colorado* (185 U.S. 125), there were but two parties litigant claiming to be sovereign in respect of the powers not specifically granted to the Union of the States, of which they themselves did not expressly or impliedly renounce the exercise. In the second case, entitled *Kansas* v. *Colorado, defendants, and the United States, intervenor* (206 U.S. 46), a newcomer appears in the rôle of plaintiff as well as intervenor, claiming in its own behalf an interest in the waters of the river, superior to that of the States in litigation, and threatening to obscure the States within the shadow of its sovereignty.

Intervention of the United States.

With the facts the reader is familiar. In simplest form, the State of Colorado, within whose territory the Arkansas River has its source, and through whose jurisdiction it flows for a distance of 280 miles, claimed the right to use its waters for the purposes of irrigation, and to convey to corporations and individuals the right to withdraw the water and to store it in reservoirs for such purpose, even although, by so doing, the waters of the river should be diminished and its flow interrupted.

[1] *State of Minnesota* v. *Hitchcock* (185 U.S. 373, 386).
[2] *State of Kansas* v. *United States* (204 U.S. 331, 343–4).

The State of Kansas, through whose jurisdiction the river flows for some 300 miles after having left the State of its origin, claimed that it had a right to the waters of the river in their ordinary flow, leaving to the inhabitants of Colorado the right to use its waters but not appreciably to lessen their volume. It complained that the State of Colorado, after diverting the waters in large quantities for purposes of irrigation, had not only interfered with the flow of the stream, but had so lessened the volume of water which would otherwise have flowed through the channel as seriously to diminish the water which the lands bordering upon and within the reach of the river needed, and whose productivity depended in large part upon what was called the under-flow and the over-flow of the stream.

The court was unwilling to decide the case upon the demurrer interposed by Colorado, which, as frequently stated in these pages, admits the truth of the facts properly pleaded, while maintaining that they do not constitute a cause of action. It therefore overruled the demurrer, with leave to the State of Colorado to answer the bill of the complainant and to set forth the facts of its case, a privilege of which the State of Colorado availed itself. In the preliminary portion of the opinion of the court, delivered by Mr. Justice Brewer, which is used by the reporter as the statement of the case, it is said :

On August 13, 1903, Kansas filed an amended bill, naming as defendants Colorado and quite a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas River. Colorado and several of the corporations answered. For reasons which will be apparent from the opinion the defenses of these corporations will not be considered apart from those of Colorado. On March 21, 1904, the United States, upon leave, filed its petition of intervention. The issue between these several parties having been perfected by replications, a commissioner was appointed to take evidence, and after that had been taken and abstracts prepared, counsel for the respective parties were heard in argument, and upon the pleadings and testimony the case was submitted.[1]

The United States claims a paramount right to deal with the waters for the general benefit.

With the contentions of the newcomer the reader, however, is not familiar, and they will be stated before passing to the opinion of the court. Counsel for the United States stated and maintained in the petition on behalf of the general Government that the lands located within the watershed of the river are arid lands ; that within this watershed there are one million acres of public lands, uninhabitable and unsaleable because lacking water, and that ' said lands can only be made inhabitable, productive, and saleable by impounding and storing flood and other waters in said watershed to the extent that said waters may be used to reclaim said land ' ; that the common law doctrine of riparian rights is not applicable to conditions in the arid region and has been abolished by statute, usage, and custom ; that there has been established in its stead in the said region a doctrine to the effect that the waters of natural streams and of flood and other waters may be impounded, appropriated, diverted, and used for the purpose of reclaiming and irrigating the arid lands therein, and that the prior appropriation of such waters for such purpose gives a prior and superior right to the water of the stream ; that, acting upon this doctrine, the United States had appropriated and used waters of streams to reclaim, make productive and profitable about ten million acres of land, and that the inhabitants of Colorado and Kansas, within the watershed of the Arkansas River, had so used its waters ; that the Congress of

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 49).

the United States passed the so-called reclamation act of June 17, 1902, in order that, by the diversion of water for irrigation purposes, and at the expense of many millions of dollars, millions of acres of land, otherwise remaining arid, would be made productive and profitable, and therefore habitable.[1] Counsel for the United States earnestly contended for the superior, and indeed paramount, right of their client, advancing, in order to do this, the possession of a power in the General Government to act for the benefit of the whole in the absence of a specific grant of a power on the part of the States to represent them and to take charge of their common interests.

The importance of the case transcends the question of water, and for this reason the argument of counsel will be dwelt upon at greater length than would otherwise be the case, although it may be premised in this place that Mr. Justice Brewer, speaking for himself and for the court, smote counsel hip and thigh and rejected the doctrine for which they contended, as having no place in, and as inconsistent with, the theory of the more perfect Union of the States. After calling attention to the dispute between the two States, as to the right to divert the waters claimed by Colorado and to their equitable use as contended by Kansas, counsel insisted that the power to determine this controversy was vested in the United States. This is true if the reference is to the judicial power of the United States, which was granted to the United States and extended to controversies between them. But counsel had in mind not a direct grant of power of this kind, nor indeed a direct grant of a general kind, but a power to be implied from the position of the general Government, which power was, in their opinion, inherent in sovereignty. This is no doubt true in an amalgamation of provinces; it does not follow that it is true in a government of limited powers, created by States as their agent and reserving to themselves all powers not specifically or impliedly granted to their agent, or otherwise renounced by them in the common interest. 'But assuming,' say Counsel, 'for the purpose of argument, without at all conceding, that this case does not clearly fall within the enumerated power and the implied powers necessary to effectuate it, there is the doctrine of sovereign and inherent power.'[2]

The doctrine of sovereign and inherent power alleged.

The line of demarcation between the direct and implied grant and the powers reserved and not renounced may be difficult to draw, but, as Chief Justice Marshall said in the leading case of *McCulloch* v. *Maryland* (4 Wheaton, 316, 405), 'the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.' Where, then, is the line to be drawn? Counsel for the United States said:

Where state antagonism to another State or the Nation begins, the state sovereignty ends, and that is at just the point where the matters of exclusive regulation within the state boundaries, the things done by or in the State, tend to pass over into the other limited sovereignties, and then the exclusive power, the reserved power, falls, or rather stops. The problem, then, does not involve the taking away prerogatives from a State wholly operating within its own confines, but only involves the taking up these prerogatives at the state lines and supplementing them by national coöperation or control so as to amalgamate or reconcile the separate forces. There is a gap and vacancy of sovereignty somewhere if the sovereign and inherent power of one State is restricted to its own territory (which of course it is), and there is no sovereign and inherent power in the Nation to regulate where the powers of two or

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 55–7). [2] *Ibid.* (206 U.S. 46, 66).

more States overlap, and so clash, and injure each other and the aggregate interests. This entails no loss of powers reserved to the States ; if it does we are in a vise—both the States and the Nation powerless at the very point where competent power is most essential.[1]

This argument is taking, but not convincing, for the Supreme Court of the United States was the agency in which controversies between the States were to be adjusted, and an act beginning in a State, but extending into another and injuriously affecting it, was to be prevented. The jurisdiction of such a case was expressly recognized by the Supreme Court in the leading case of *Missouri* v. *Illinois* (180 U.S. 208), although the facts in this case did not justify the exercise of its jurisdiction in the form of an injunction (200 U.S. 496).

Argument from the power to regulate commerce.

In a previous portion of the argument of counsel, the power to regulate commerce had been referred to as intercourse and as intercourse in the broadest sense ; because of this power the general Government was to administer and to control the waters of streams and rivers flowing through more than one State. 'Would Federal administration and control of irrigation on interstate streams,' it was asked, 'subject to regard for the different State laws as directed by Congress, and always subject to the power and jurisdiction of this court to pass upon interstate controversies, encroach in any respect upon the powers reserved to the States or the people ?' To this question, put by counsel in its least objectionable form, counsel themselves answered :

> The powers reserved to the States are powers confined wholly to their respective borders. The powers reserved to the people relate to possible encroachments on their personal and individual rights of life, liberty, and the pursuit of happiness. . . . The function and power of the Government, on the legislative and executive side, in reference to the distribution of the flow of the Arkansas River, are involved in this case.

And the conclusion from these premises was logical and inevitable, if the premises themselves be admitted, and the decree should, in accordance with their premises, as stated by counsel, 'embrace in terms or in effect a recognition of the national law and of the Government's right to direct the matter of water distribution on this non-navigable interstate stream.'[2]

Counsel for the Government were aware that the decree for which they asked must rest on a great and a pervading principle, which they had no difficulty in producing and which they stated as follows :

> The great principle here and whenever it is a question of conflict between States or between a State and the Nation is that the Constitution and the laws made in pursuance thereof are supreme ; that they control the constitution and laws of the respective States, and cannot be controlled by them. The powers of Congress are not given by the people of a single State ; they are given by the people of the United States to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. *McCulloch* v. *Maryland*, 4 Wheat. 426, 429.[3]

Like most general statements, this is appealing ; to the person not familiar with this Union of States it may seem decisive ; to the superficial the citation of an

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 68).
[2] *Ibid.* (206 U.S. 46, 69).
[3] *Ibid.* (206 U.S. 46, 69–70).

authority such as *McCulloch* v. *Maryland* is sufficient. But it is to be borne in mind that the nation is a union of States and the Government of this Union is a Government of limited powers. The Congress is composed, in the first place, of two representatives of each of the States in the Senate, and representatives of the people of the States in the House of Representatives; and no act or resolution of the United States in Congress assembled is other than a scrap of paper unless it is within the grant of power, directly or impliedly made, by the States, which expressly reserve all other powers which they have not so granted, expressly or by necessary implication, or of which they have not renounced the exercise. This is the doctrine of *McCulloch* v. *Maryland*, which has never been questioned and which Chief Justice Marshall, in delivering the opinion, said had never been questioned, that this is a Government of limited powers, that there are two sovereignties within this country with separate and distinct spheres, one the sovereignty of the United States, the other the sovereignty of the States, each supreme within its sphere and neither supreme within the sphere of the other.

The question, therefore, is not whether this is a nation, whether a law of the Congress is superior to a law of the State in conflict with it, but whether a law of Congress, whatever it may be, is a law which Congress has, under the limited grant of power, the right to pass and to clothe with the majesty of law.

In justification of their theory of government counsel dwelt upon the interests in conflict and the effect of a decree of the court in favour of one or other of the States contrary to the interests of the United States. In support of the views which they felt themselves obliged to advance, counsel for the United States said in their brief:

As to the particular facts involved, the petition for intervention alleged, and the evidence shows, that within the watershed of the Arkansas River in Colorado and Kansas there are about one hundred thousand acres of public arid land, which can only be reclaimed and made habitable by the application thereto of the waters of said stream; that in the arid region of the United States from sixty million to one hundred and fifty million acres of public land now valueless and uninhabited may be reclaimed by irrigation and made to sustain a population of one hundred million persons; that within the forty-seven Indian reservations within the arid region, which reservations aggregate forty-eight million acres, there are located about one hundred and sixteen thousand Indians; that to support them it is necessary to irrigate lands within the reservation; and that the Government is assisting the Indians in reclaiming them.

That over ten million acres of land originally arid have already been reclaimed by irrigation at a cost of over two hundred million dollars, and are greater in extent than all the cultivated lands within the New England States. That these lands and improvements are worth not less than five hundred million dollars and support directly and indirectly over five million persons. Of these ten million acres, at least two million are in the State of Colorado, and they are capable of raising crops of the value of over forty million dollars annually. Within the watershed of the Arkansas River in Colorado there are over three hundred thousand acres of irrigated land, and in the same watershed in Kansas, about thirty thousand acres.

Federal opposition to the claims of each State.

The relief sought by complainant would require a decree of the court, the principle of which if enforced would be to prevent the reclamation and cultivation of any of the public lands within the arid belt and have the effect of returning to their original condition lands which have already been reclaimed. A decree sustaining Colorado's contention to the effect that it has 'plenary and exclusive right and power to control and regulate the use of non-navigable streams within its boundaries', whether state

or interstate, would have the effect, if the doctrine on which it was based was enforced, of measureably limiting the amount of arid lands which would otherwise be reclaimed. In view of these facts, and the further fact that the Government by the so-called Reclamation Act of June 17, 1902, 32 Stat. 388, had adopted a scheme to reclaim its arid lands by irrigation, its interests will undoubtedly be affected one way or the other by any decree or judgment of the court. Hence it has the right to intervene and be heard 'before the judgment is given', although it is not to be recognized as a party to the suit, in a technical sense, or entitled to any decree in its favor. *Florida* v. *Georgia*, 17 How. 478, 495.[1]

As further stating the views of counsel, the following additional passage is quoted:

Denial of State ownership in the beds of non-navigable rivers.

As intervenor the Government admits that the court has jurisdiction of the subject matter of the action. It denies that Kansas owns the bed of the river in said State. It contends that only the shores and beds of navigable waters are reserved to the State by the Federal Constitution . . . ; the Arkansas River is not navigable in Kansas, hence the abutting owners on the stream when they obtained title from the Government, also acquired title to its bed. . . .

The evidence shows that the use of the waters of the stream in Colorado for irrigation purposes has not interfered with its navigable capacity where navigation is a recognized fact, hence no duty devolves upon the intervenor to aid complainant in securing a decree to enjoin Colorado from using the waters to the end that navigation be protected and preserved. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709.[2]

After a discussion of the California doctrine, permitting a reasonable use of the water of a stream to irrigate riparian lands, and stating that that doctrine, the Colorado doctrine, and the common law doctrine obtaining in Kansas would be destructive of the claims of the United States, counsel continue, stating and expounding their theory of the law applicable and the results of the evidence taken in the case:

Each State has certain rights to the waters of an interstate stream. The right of either cannot be destroyed by the other. Manifestly the law of neither State extends beyond its boundaries. Neither Colorado nor any of its citizens can by legal proceedings in Kansas acquire the right to appropriate the waters of a stream in Colorado. *Pine* v. *New York City*, 185 U.S. 105. When, therefore, a dispute arises in respect to the waters of an interstate stream, such as involved in the present proceeding, the question to be determined is, What rule of law shall be applied, and what tribunal has the power to enforce the rule? The Government contends that this court has the power to find, apply and to enforce the proper rule. That it should find the same outside of the law of either State, not within the common law doctrine of riparian rights, strict or modified, but within the maxim *salus populi est suprema lex*. The rule to be applied should be one capable of enforcement and of uniform application in both States. The rule which meets the requirement is not 'water runs; let it run'; but that 'water irrigates; let it irrigate'. In other words, that such waters may be appropriated and used to irrigate land within the watershed of the stream, 'leaving, however, sufficient in or returning sufficient to the beds of the stream for domestic, household and stock purposes,' subject, also, to the limitation that priority of time of appropriation determines priority of right, irrespective of state lines. The application and enforcement of such rule will not interfere with any vested right of the State of Kansas or any of its citizens, such as are protected by the Federal Constitution, for the reason that the superior rights of riparian owners to the waters of a stream in the arid region are not the same as in the humid belt (*Clark* v. *Nash*, 198 U.S. 361, 370) and of necessity are limited to the use of such waters for domestic purposes, which include, of course, water sufficient for live stock purposes.

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 70–1). [2] *Ibid.* (206 U.S. 46, 71–2).

The evidence in the case shows that the use of the waters above for irrigation purposes, if confined within the watershed of the stream, returns to the stream by seepage sufficient water for domestic purposes below. This being the effect of irrigation above the superior right to riparian owners below is not affected. While the Constitution prohibits the practical destruction or material impairment of property (*Manigault* v. *Springs*, 199 U.S. 473), yet, generally speaking, the evidence in this case shows that irrigation above neither destroys nor materially impairs riparian lands below.

In respect to the so-called 'underflow', the evidence of the government witnesses shows that it is percolating waters and not a subterranean stream; further, that its source is rainfall and not the river.

Sub-surface waters are presumed to be percolating waters, hence the burden of proof to show that they flow in a well defined channel is upon the party who denies that they are percolating waters. *Barclay* v. *Abraham* (Iowa) 64 L.R.A. 255. Where the common law doctrine of riparian rights prevails, subterranean waters when they flow in a well defined channel are subject to the same rules of law as surface streams. Percolating waters belong to the owner of the land underneath which they are found, and adjacent landowners have no correlative right to them. . . .

In the State of Kansas subterranean waters may be appropriated and used for irrigation purposes.[1]

On the bill of complaint filed by Kansas, and considered in the first case of *Kansas* v. *Colorado* (185 U.S. 125), upon the bill of complaint as amended by Kansas, upon the answer of Colorado, upon the replications of both parties, upon the petition of intervention of the United States, and upon the facts as found by commissoners appointed to take evidence, the entire case came before the court in the second case of *Kansas* v. *Colorado* (206 U.S. 46). The opinion, which was delivered by Mr. Justice Brewer on behalf of his brethren, is to be taken as the opinion of the court, although Mr. Justice White and Mr. Justice McKenna are stated as concurring in the result, thus intimating rather than stating dissent from the reasoning by virtue whereof the result in which they concurred was reached.

Judgement of the Court.

It has been said that the entire case was before the court, and this statement was advisedly made, inasmuch as Mr. Justice Brewer, in the very opening sentence of his opinion, himself says:

While we said in overruling the demurrer that 'this court, speaking broadly, has jurisdiction', we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented.[2]

The learned Justice therefore stated on behalf of his brethren that he would begin with this inquiry, and first would deal with the court's jurisdiction of the controversy between the original litigants, Kansas and Colorado. But the importance of settling the jurisdiction of the court in this case was based upon the fact that it differed from others, which had largely been boundary cases, that the exercise of jurisdiction by the court had called attention to it, and that the exercise of jurisdiction, already frequent, was likely to become more frequent in the future. Classes of cases arising out of the newer conditions would surely be presented for decision, just as classes of cases arising out of the older conditions, which were passing if not past, were brought to the court for its determination. This thought finds fitting expression in the second paragraph of the opinion, Mr. Justice Brewer saying for the Court:

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporated rights are claimed by the respective litigants.

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 74–6). [2] *Ibid.* (206 U.S. 46, 80).

Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.[1]

For this reason the learned Justice felt, and properly, that the question of jurisdiction should be considered, and as a preliminary thereto he indulged in a careful and discriminating survey of the relations of the States to the creature of their hands, which he calls a Nation rather than a Union or a League of States. This discussion is, in many respects, more interesting than the case itself, and is relevant because of the contentions of counsel for the General Government, who saw in the Union a sovereign Nation, not a Nation with certain sovereign powers.

Union and Nation.

Words are arguments, and the word ' Nation ' carries with it more than ' Union ', although, when the powers of the nation come to be considered, they can only be the powers granted by the States to what they themselves called, in the opening sentence of the Constitution of these United States, ' a more perfect Union,' declared by them to be the purpose of their convention ; and their final definition of their work cannot be changed, enlarged, or diminished by catching at expressions used in debate or in projects which were considered only to be rejected.

But to Mr. Justice Brewer, who says :

It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of States. Whatever powers of government were granted to the Nation or reserved to the States (and for the description and limitation of those powers we must always accept the Constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.[2]

As just remarked, words are arguments, and if ' nation ' carries with it a sense of majesty lacking in ' union ', it is evident that the union is the nation, and it cannot escape notice that it is impossible to refer to this nation without disclosing the fact that it is a nation of States, not of provinces. Mr. Justice Brewer, therefore, very properly, with admirable discrimination, and with more than commendable brevity, invokes the following authorities for the view that the union constitutes a nation :

The first resolution passed by the convention that framed the Constitution, sitting as a committee of the whole, was : ' Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive.' 1 Elliott's Debates, 151.

In *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 404, Chief Justice Marshall said :

' The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.'

See also *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, opinion by Mr. Justice Story.

In *Dred Scott* v. *Sandford*, 19 How. 393, 411, Chief Justice Taney observed :

' The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 80). [2] *Ibid.* (206 U.S. 46, 80).

rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations.'

And in Miller on the Constitution of the United States, p. 83, referring to the adoption of the Constitution, that learned jurist said : ' It was then that a nation was born.' [1]

The fact, however, that this new political body is controlled in all its actions by the Constitution, and, as Mr. Justice Brewer stated, by the Constitution alone, whose provisions he is very careful to cite, which apportions the sovereignty between the nation on the one hand and the States on the other, makes it immaterial for present purposes whether the language of the framers of the Constitution be followed, or that of its expounders and commentators ; for although nation may be, as Dickens might put it, ' a more tenderer word,' union, not nation, is the language of the Constitution.

But if Mr. Justice Brewer prefers to speak of the more perfect Union as a nation, he has no illusions as to the relation of the States to the nation, and he proceeds to the distribution of sovereign powers according to the Constitution, and to define the interrelation of the State and nation according to the classic judgements of Chief Justice Marshall. As material to the case in hand, and as bearing upon contentions of counsel for the United States, Mr. Justice Brewer refers to the grant of legislative and judicial power as contained in the Constitution, finding the grant of one limited and the other without restrictions except such as are inherent in judicial power, thus showing that the Government of the Union must bend to the grant of power conveyed by the Constitution and cannot exercise a right not directly or indirectly vested in the Congress, in contradistinction to the judicial power, which is not thus limited. As this distinction is not merely decisive of the case, but of fundamental importance, Mr. Justice Brewer enlarges upon it, saying :

The Federal government is one of enumerated powers.

In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments : The first article, treating of legislative powers, does not make a general grant of legislative power. It reads : 'Article I, Section 1. All legislative powers herein granted shall be vested in a Congress,' etc. ; and then in Article [Section] VIII mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.[2]

For this statement, which is so familiar as to be axiomatic, no authority is needed other than the wording of the Constitution. Yet the language of Chief Justice Marshall in the leading case of *M'Culloch* v. *Maryland* (4 Wheat. 316, 405) which Mr. Justice Brewer advisedly quotes on this point, cannot be too often quoted :

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all these arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

Passing now to the judiciary, the learned Justice says :

On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that,' the

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 81). [2] *Ibid.* (206 U.S. 46, 81).

But the whole judicial power is granted.

judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish'. By this is granted the entire judicial power of the Nation. Section 2, which provides that 'the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,' etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising.[1]

After referring to the case of *Chisholm* v. *Georgia* (2 Dallas, 419), which led to the 11th amendment, and to the case of *Hans* v. *Louisiana* (134 U.S. 1), in which that amendment was construed and the circumstances leading to its adoption stated, the learned Justice said :

> This Amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another. As said by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 407 : 'The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.'[2]

And the learned Justice likewise referred to the case of *South Dakota* v. *North Carolina* (192 U.S. 286), in which he himself had the honour to deliver the opinion of the court, without, however, mentioning that fact :

From this brief discussion of the nature of the judicial power Mr. Justice Brewer felt justified in saying :

> Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the Nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not without its consent subject to the controlling action of any of its instrumentalities or agencies. The creature cannot rule the creator. . . . Nor is it inconsistent with the ruling in *Wisconsin* v. *Pelican Insurance Company*, 127 U.S. 265, that an original action cannot be maintained in this court by one State to enforce its penal laws against a citizen of another State. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the State.[3]

Returning, then, to the question of legislative power and its limitation, contrasted with the unlimited power of the judiciary, Mr. Justice Brewer thus states his conclusion on both of these points :

The grants of legislative and judicial powers compared.

> These considerations lead to the propositions that when a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power.[4]

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 82).
[2] *Ibid.* (206 U.S. 46, 83). [3] *Ibid.* (206 U.S. 46, 83). [4] *Ibid.* (206 U.S. 46, 83–4).

Re-enforcing these views which he had expressed on the nature and extent of the judicial power, he refers, not inappropriately, to the 9th of the Articles of Confederation, vesting in the Congress jurisdiction over all causes, and he showed very briefly how the jurisdiction of that body, transferred to the Supreme Court, 'carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the States which are justiciable in their nature.' And, citing an authority for every step in the process of his reasoning, he quotes from the great and leading case of *Rhode Island* v. *Massachusetts* (12 Peters, 657, 743):

All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do, settle the controversies between them.[1]

And rounding out this phase of the subject, which is by way of introduction to the case at hand, he thus refers to the fact that the United States can sue as a State, but that the United States, being created by the Constitution, was not able to consent to be sued in the instrument creating it:

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. *United States* v. *Texas*, 143 U.S. 621; S.C., 162 U.S. 1; *United States* v. *Michigan*, 190 U.S. 379.

The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized. *Kansas* v. *United States*, 204 U.S. 331, 341, and cases cited.[2]

The learned Justice, having thus established to his satisfaction the general grant of judicial power, unlimited unless restricted by express provision of the Constitution, thereupon proceeds to consider whether this particular controversy is justiciable, for, if so, the Supreme Court not only may, but must, entertain jurisdiction and decide the controversy, upon the facts as proved. And that there may be no doubt as to the question before the court, he thus states it:

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas River into Kansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right is the amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.[3]

In referring to the case of *Chisholm* v. *Georgia* (2 Dallas, 419) Mr. Justice Brewer

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 84).
[2] *Ibid.* (206 U.S. 46, 84–5).
[3] *Ibid.* (206 U.S. 46, 85).

quoted, and as indicating his own method of approach, a portion of the opinion of Mr. Justice Wilson, in which that very learned man said, speaking of the question of the suability of a State then before the court :

> This question, important in itself, will depend on others, more important still ; and, may, perhaps, be ultimately resolved into one, no less radical than this—Do the people of the *United States* form a nation ?

Mr. Justice Brewer, after stating the case, takes up what he, as well as his illustrious predecessor, considered the paramount issue, saying :

> The primary question is, of course, of national control. For, if the Nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two States in the absence of national regulation ? [1]

Congress can control navigable rivers,

Referring to the fact that Congress has, by virtue of the Constitution, the power to regulate commerce among the several States, and can, because thereof, exercise ' extensive control over the highways, natural or artificial, upon which such commerce may be carried ', preventing or removing obstructions in the natural waterways and preserving the navigability of those ways, Mr. Justice Brewer invokes the case of *United States* v. *Rio Grande Irrigation Company* (174 U.S. 690), and quotes a small portion from the opinion of the court, which he had the honour to deliver on that occasion, stating the relations between the Union and the States in regard to this matter :

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized : First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters ; so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action.

From the language of the court in that case, it follows, he says,

> that if in the present case the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the Government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.[2]

but this river is not navigable in Kansas.

Stating the case of the United States more in detail, he continues :

> It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands ; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of these lands ; that the National Government is itself the owner of many thousands of acres ; that it has the right to make such legislative provision as in its judgement is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.[3]

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 85).
[2] *Ibid.* (206 U.S. 46, 86).
[3] *Ibid.* (206 U.S. 46, 86–7).

Here we have the case of the United States, whose counsel advance the right to reclaim these arid lands in the theory of inherent sovereignty, inasmuch as there was no grant of power to which they could point ; and as this is the crux of the controversy, as far as the United States is concerned, it is necessary, even at the expense of repetition, to restate the contention of counsel, in order that the conclusion of the court on this point be understood, because, if an invocation of a power on the part of the United States is in law equivalent to a grant, there is an end of limited power, whether it be under the Constitution of the United States or under a convention of the society of nations.

This contention of counsel was : that the doctrine of riparian rights was inapplicable to conditions obtaining in the arid region ; that, if applicable, it would prevent the reclamation of arid lands of the Government ; that, owing to the given conditions in the arid region, the waters of natural streams could be used to cultivate arid lands, whether riparian or non-riparian ; and that the priority of appropriation established a prior and a superior right. As thus stated, and as pointed out by Mr. Justice Brewer, this contention is equivalent to a claim on the part of the United States to control 'the whole system of the reclamation of arid lands', and raises the question, not whether the United States could use the waters of a stream to irrigate the lands bordering upon it, but 'whether the reclamation of arid lands is one of the powers granted to the General Government'. But, stating that 'the constant declaration of this court, from the beginning, is that this Government is one of enumerated powers', the learned Justice refers to two of the many cases on this point : (1) *Martin* v. *Hunter's Lessee* (1 Wheaton, 304, 326), decided in 1816, in which Mr. Justice Story said :

> The Government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.

and (2) *United States* v. *Harris* (106 U.S. 629, 635), decided in 1883, in which Mr. Justice Woods, speaking for the court, said :

> The Government of the United States is one of delegated, limited, and enumerated powers.

This leads Mr. Justice Brewer to examine the portion of the Constitution dealing with the grant of legislative power, and to make the following general and particular observations :

The reclamation of arid lands is not among the powers granted to the United States.

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice Marshall in these words: 'We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are

appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional'—a statement which has become the settled rule of construction. From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress.[1]

Finding no grant of power enabling Congress, directly or indirectly, to take measures to reclaim arid lands as such, counsel for the United States look to article 4, Section 3, of the Constitution, which provides that 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State'. But this reference was as unfortunate as the previous one, according to Mr. Justice Brewer, who, in rejecting and commenting upon it, used the following impressive and measured language:

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property'. It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the Government relies upon 'the doctrine of sovereign and inherent power,' adding 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference'. His argument runs substantially along this line: All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by

The 10th Amendment considered.

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 87–8).

the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States.[1]

The quotation from Mr. Justice Brewer is interrupted in order to make it clear that the people of the United States, referred to in the preamble of the Constitution, are the people of the States. In the original draft of this instrument the contracting parties were specifically stated as 'We, the people of the States' of . . . mentioning them ; and, fearful lest one or more of the States should not ratify the Constitution, as happened in the case of North Carolina and Rhode Island, the names of the States were omitted, in order that that instrument might not, in its opening language, be convicted of error. This is historic fact, and fact and history are thus stated judicially by Mr. Chief Justice Marshall, who always knew whereof he spoke, in the leading case of *M'Culloch* v. *Maryland* (4 Wheaton, 316, 403), decided almost a century ago :

They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States ; and where else should they have assembled ? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

But to return to Mr. Justice Brewer and his line of reasoning :

This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.[2]

The advocates of a strong centralized government, who would look upon the States as provinces, are accustomed everywhere to interpret broadly and extensively grants of power in their behalf, and to gloss over or to interpret strictly limitations on power as inconsistent with government and its existence. But the court, of which Mr. Justice Brewer was the mouthpiece, on this occasion had no such purpose in mind, and Mr. Justice Brewer would hardly have countenanced it, as his views on this point were on record in the case of *Fairbank* v. *United States* (181 U.S. 283, 288), decided in 1890, in which he had the honour to deliver the opinion of the court, and in the course of which he said :

We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized.

The learned Justice then takes up the alleged power of the Government to reclaim arid lands, and in this portion of his opinion he shows the Supreme Court

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 89–90). [2] *Ibid.* (206 U.S. 46, 90–1).

to be the bulwark of the States against insidious assaults against their sovereignty, whether it come from within the States or from their agent, the United States:

At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised.

It does not follow from this that the National Government is entirely powerless in respect to this matter. These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation.[1]

And very briefly, one may almost say contemptuously, Mr. Justice Brewer disposed of the doctrine of inherent sovereignty, which would have made of the United States a single State and of the States provinces, saying:

Each State has jurisdiction over its own land,

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.[2]

Indeed, the learned Justice was apparently inclined to think that sovereignty was inherent in the States, from which the United States derived whatever claim to sovereignty it might possess, quoting with approval a statement of Mr. Justice Bradley in *Barney* v. *Keokuk* (94 U.S. 324, 338), decided in 1876, in which that sober judge said, in speaking of the proprietorship of the beds and shores of navigable waters:

It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.[3]

And Mr. Justice Brewer again refers to the same learned Justice in the case of *Hardin* v. *Jordan* (140 U.S. 371, 381, 382), decided in 1891, from which he quotes the following passages:

Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 91–2).
[2] *Ibid.* (206 U.S. 46, 93). *Ibid.* (206 U.S. 46, 94).

may be made by Congress with regard to public navigation and commerce. . . . Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. . . . This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas ; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State ; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.

And taking this statement of Mr. Justice Bradley as sound law, Mr. Justice Brewer necessarily reaches the following conclusion as to the right of the State in the premises :

and may determine its own law of riparian rights.

It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State.[1]

But counsel for the United States were not the only sinners in this respect. If they claimed sovereignty in behalf of their client, counsel for Kansas claimed that, prior to the admission of Colorado, the common law doctrine of waters had been imposed by Congress upon the territory from which the State of Colorado was formed. But Mr. Justice Brewer, a believer in the equality of States, whether young or old, large or small, as a Justice of the Supreme Court must profess to be, made short shrift of this contention, saying :

In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. . . . But when the State of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States. . . .[2]

The difficulty which faced the court was that the plaintiff recognized generally the common law of riparian rights, whereas the defendant prescribed the doctrine of public ownership of flowing water. On this point Mr. Justice Brewer said : ' Neither State can legislate for or impose its own policy upon the other,'[3]—language aptly describing the relations between nations as between States of the Union, and recalling the broad and majestic language of Chief Justice Marshall in the case of *The Antelope* (10 Wheaton, 66, 122), decided in 1825, who, in speaking of nations, admittedly and perhaps only too sovereign, or at least too set upon the exercise of their sovereignty, said : ' No one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.'

This statement might seem to withdraw the case from the court, because the Congress had made no law and could not, and the law of neither State could prevail against the other. Where, then, is the law for the court to administer, because it can only administer law, and it cannot make but must interpret and apply the law

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 94).
[2] *Ibid.* (206 U.S. 46, 95).
[3] *Ibid.* (206 U.S. 46, 95).

which it finds ready to its hands. Mr. Justice Brewer recognized this difficulty, saying:

The case is, however, justiciable

It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court.[1]

The disagreement makes the controversy. The court has jurisdiction to settle controversies between the States by virtue of the grant of judicial power, which, in the very article of the Constitution by virtue whereof the Supreme Court has jurisdiction, is extended to cases involving law or equity. When law is mentioned in the Constitution the law of the home country is to be understood as that system of jurisprudence with which the framers of the Constitution were familiar, and which they had in mind when they thought or spoke of law. This was and is the common law, stated by Chancellor Kent to be 'those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature'.

under the common law,

Mr. Justice Brewer, basing himself upon the authority of Kent, thus proceeds, adding the weight of his opinion to that of the great Commentator on American Law:

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute.[2]

So far the language of the learned Justice relates to the common law, and it might be presumed, if it stood alone, that the common law was the only law which the Supreme Court could administer in controversies between States. Such is not the fact and it was not his intention to leave that impression, for he thus continues:

and also under international law.

Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law.[3]

The reason for this is expressly and attractively stated in the happy phrase that 'international law is no alien in this tribunal',[4] and although he needed no authority for the fact, and could find no better expression of it than his own, he nevertheless invoked two as material to the case, and which are certainly material to the purpose

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 95–6).
[2] *Ibid.* (206 U.S. 46, 96–7). [3] *Ibid.* (206 U.S. 46, 97). [4] *Ibid.* (206 U.S. 46, 97).

of this narrative. The first is to be found in the case of *The Paquete Habana* (175 U.S. 677, 700), decided in 1900, in which Mr. Justice Gray declared :

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The second is the admirable passage from the judgement of Mr. Chief Justice Fuller in the first phase of *Kansas* v. *Colorado* (185 U.S. 125, 146), decided in 1902 :

> Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand.

It has been stated but a moment ago that Mr. Justice Brewer was a believer in the equality of States, and if he had not said so in express terms, his language regarding international law, of which equality of States is a part, might be paraphrased so as to read that equality is no alien in this tribunal. But it was necessary to this case to say it, and he said it in language as applicable to the society of nations as to the Union of States :

Equality of the States.

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois*, 180 U.S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these two ways being practicable, it must be settled by a decision of this court.[1]

The Court makes an 'interstate common law'.

In the case in hand, held by the court to be justiciable, the illustrious plaintiff appeals to the court for relief, not merely as owner of some of the lands abutting upon the river and affected by its flow, but, in the larger and more compelling capacity, as a sovereign State, *parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens, and complaining that, through the action of

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 97–8).

Colorado, a large portion of its territory is threatened with destruction. Because of this, as Mr. Justice Brewer states, 'The controversy rises, therefore, above a mere question of local private right, and involves a matter of State interest and must be considered from that standpoint.'[1] As authority for this, for the learned Justice never takes a step in advance without an authority in that behalf, he cites the case of *Georgia* v. *Tennessee Copper Company* (206 U.S. 230, 237–8). The facts of this case differ from the one in hand and yet they are in point. The Tennessee Copper Company operated within the State of Tennessee, close to the boundary of Georgia, generated large quantities of noxious gases, which, passing the frontier into Georgia, threatened destruction of forests, orchards, and crops situated in five of the counties of that State. In deciding this case, Mr. Justice Holmes, speaking in behalf of the court, used the following language, applicable to other situations and to the relations of sovereign States:

> This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. . . .
>
> The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri* v. *Illinois*, 200 U.S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 U.S. 208, 241. . . .
>
> If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up *quasi*-sovereign rights for pay; . . . The States by entering the Union did not sink to the position of private owners subject to one system of private law. (206 U.S. 237–8.)

This changed, as the learned Justice said, the scope of the inquiry, and the principle involved in the case was no longer whether the State of Colorado withheld any portion of the waters of the Arkansas. 'We must consider', the learned Justice said, 'the effect of what has been done upon the conditions in the respective States and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream.'[2]

Distinction between private and State rights.

The first question was one solely between individuals, the second between States, with the different interests which States have from individuals. This difference the learned Justice thus illustrates:

> Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.[3]

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 99).
[2] *Ibid.* (206 U.S. 46, 100).
[3] *Ibid.* (206 U.S. 46, 100).

In the matter of the States, he says :

We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two States, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit from the flow of the Arkansas through Kansas has territorially changed. Science may not as yet be able to give positive information as to the processes by which the distribution of water over certain territory has operation beyond the mere limits of the area in which the water is distributed, but they who have dwelt in the West know that there are constant changes in the productiveness of different portions of the territory, owing, apparently, to a wider and more constant distribution of water.[1]

The Court will consider the general benefit to both States.

The learned Justice, by way of illustration, calls attention to the fact that, during the time when Kansas was a territory, productive lands of the State were situated within the vicinity of the Arkansas River ; that the working of the land enabled the rains to sink in and to render them productive ; and he expressed the belief that, just as the area of cultivation had proceeded westward from the Missouri, by the watering of the arid lands of Colorado the area of cultivated land would extend eastward from Colorado, so that 'between the Missouri River and the mountains of Colorado there would be no land unfit for cultivation.'[2] Contemplating this state of affairs as probable, because of this development to which he referred, he asks :

Will not the productiveness of Kansas as a whole, its capacity to support an increasing population, be increased by the use of the water in Colorado for irrigation ? May we not consider some appropriation by Colorado of the waters of the Arkansas to the irrigation and reclamation of its arid lands as a reasonable exercise of its sovereignty and as not unreasonably trespassing upon any rights of Kansas ?[3]

But, believing that withdrawing the waters of the Arkansas would ultimately result in benefit to Kansas as well as to Colorado, he was, however, unwilling to have the case depend upon a state of affairs which might be considered as problematical, and which, in any event, was not subject to legal proof. He therefore turned to the common law of waters, as understood and administered in Kansas, which allowed this action on the part of the State of Colorado.

After referring to the case of *Clark* v. *Allaman* (71 Kans. 206), as an authority for the statement which he had made, and to the decision of the Massachusetts jurist,

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 100–1).
[2] *Ibid.* (206 U.S. 46, 102).
[3] *Ibid.* (206 U.S. 46, 102).

Chief Justice Shaw, in the case of *Elliott* v. *Fitchburg Railroad Company* (10 Cush. 191, 193, 196), he thus continues :

As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation.[1]

After a description of the nature and the course of the river in Colorado and in Kansas, from which State it enters the State of Oklahoma, he goes on to say that ' if the extreme rule of the common law were enforced, Oklahoma having the same right to insist that there should be no diversion of the stream in Kansas for the purposes of irrigation that Kansas has in respect to Colorado, the result would be that the waters, except for the meagre amount required for domestic purposes, would flow through eastern Colorado and Kansas and be of comparatively little advantage to either State, and both would lose the great benefit which comes from the use of water for irrigation '. [2]

So much for the jurisdiction of the court to hear the case at all, for the contentions of the United States, and for the consequences which would follow, both to Colorado and Kansas, if Oklahoma, through which the river later flows, should invoke the rule of law against both which Kansas sought to enforce against Colorado.

After an examination of the testimony in the case, amounting to 8,559 typewritten pages and 122 exhibits, by virtue whereof it appeared that Colorado greatly increased the cultivation of its soil by watering its arid lands, resulting in a substantial increase of population, and a statement that the withdrawal of the waters of the Arkansas within the jurisdiction of Colorado did, in fact, somewhat injure the adjoining districts of Kansas, but not at all in proportion to the benefits conferred upon the State of Colorado, Mr. Justice Brewer, in behalf of the court, whose opinion he delivered, thus stated its conclusions and the form and nature of the decree which, as a consequence, should be entered in this case :

Summary of the evidence and general conclusions.

We are of the opinion that the contention of Colorado of two streams cannot be sustained ; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas ; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied ; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through the irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes.

Petition of the U.S. dismissed without prejudice.

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the rights of the United States to take such

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 104–5). [2] *Ibid.* (206 U.S. 46, 105).

action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river. Each party will pay its own costs.[1]

Bill of Kansas dismissed without prejudice

No costs awarded.

Of the ten cases forming the present group five relate to boundary and do not suggest comment. Of the others, two, *Missouri* v. *Illinois* (200 U.S. 496) and (202 U.S. 598), dealt with the larger question concerning the health and well-being of the community, invoking the aid of the court against the pollution by Illinois of a river flowing between the two States; a third, *Kansas* v. *Colorado* (206 U.S. 46), involved a different phase of the same great question, lest, through the action of a State in which a river rises, the inhabitants of another State lower down its course should suffer because of the diversion of its waters. In each case the court took jurisdiction, in each case relief was denied due to the lack of proof to sustain the grievance, and each case has already been discussed in connexion with the previous group.

The preceding cases summarized.

In the latter of the remaining two, *Kansas* v. *United States* (204 U.S. 341), the court decided that the second section of the third article of the Constitution, while regarding the United States as a proper party to an action, did not give general consent to a suit against it at the instance of a State of the Union; and therefore, before assuming jurisdiction, the Supreme Court would have to satisfy itself that special consent had been given in the special case. In the former, *South Carolina* v. *United States* (199 U.S. 437), the court held in simplest terms that if a State will go into business it is to be treated as a tradesman.

X.

ASSUMPTION OF JURISDICTION A MATTER OF COURSE; SECOND PHASE OF POWER OF COURT TO ENFORCE ITS JUDGEMENT.

62. State of Virginia v. State of West Virginia.

(206 U.S. 290) 1907.

Virginia and West Virginia are the most litigious States of the American Union, if tested by the frequency with which they have resorted to the Supreme Court, Virginia having been twelve times a plaintiff and twice a defendant in suits between the States. And West Virginia, although a newcomer in the Union of States, has been a party to twelve suits, each time a defendant, and of these twelve no less than ten were with the State of Virginia, all arising out of the separation of the Western counties of the State during the Civil War and their formation into a State of the Union.

The first of the suits between the two States, *Virginia* v. *West Virginia* (11 Wallace, 39), was decided in 1870, in which the facts involved in the separation of the western counties from the Commonwealth were stated and the right of the new State to territory claimed by it asserted and confirmed.

[1] *State of Kansas* v. *State of Colorado* (206 U.S. 46, 117–18).

The second, *Virginia* v. *West Virginia* (206 U.S. 290), decided in 1907, is the first of a series of nine, springing out of the separation, but dealing with the financial as distinct from the territorial situation created by the formation of the new State.

Question of West Virginia's share of the State debt.

The question, although varying in each, is one and the same : the amount of indebtedness of the State of Virginia incurred before the separation which in law and in equity should be assumed and paid by the State of West Virginia. The mere mention of this fact shows, without the need of comment, that the series is of interest to the society of nations, even although the question turned upon a local or a particular statute rather than upon a general principle of international law.

Judgement of the Court.

The preliminaries of the controversy, necessary to an understanding of the case in hand and of the series which it ushers in, are admirably stated in two passages in the opinion which Mr. Chief Justice Fuller delivered on behalf of a unanimous court assuming jurisdiction of the dispute. In the first of these passages he gives what may be called the historical setting of the case ; in the second he describes the action of West Virginia assuming a share of the debt contracted by the Commonwealth of Virginia, of which it then formed a part, and the limitations which it placed upon the liability which it admitted and assumed. Under the first heading the Chief Justice said :

History of the case.

Admission of West Virginia.

The State of West Virginia was admitted into the Union June 20, 1863, under the proclamation of the President of the United States of April 20, 1863, in pursuance of the act of Congress approved December 31, 1862, upon the terms and conditions prescribed by the Commonwealth of Virginia in ordinances adopted in convention and in acts passed by the General Assembly of the 'Restored Government of the Commonwealth', giving her consent to the formation of a new State out of her territory, with a constitution adopted for the new State by the people thereof. The ninth section of the ordinance adopted by the people of the 'Restored State of Virginia' in convention assembled in the city of Wheeling, Virginia, on August 20, 1861, entitled 'An ordinance to provide for the formation of a new State out of a portion of the territory of this State,' provided as follows :

Provision for a share of the debt.

'9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted ; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia. . . .'

The consent of the Commonwealth of Virginia was given to the formation of a new State on this condition. February 3 and 4, 1863, the General Assembly of the 'Restored State of Virginia' enacted two statutes in pursuance of the provisions of which money and property amounting to and of the value of several millions of dollars were, after the admission of the new State, paid over and transferred to West Virginia.[1]

Under the second heading, the Chief Justice said :

Constitution of West Virginia.

The constitution of the State of West Virginia when admitted contained these provisions, being sections 5, 7, and 8 of Article VIII thereof, as follows :

'5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war.'

[1] *State of Virginia* v. *State of West Virginia* (206 U.S. 290, 315–16).

'7. The legislature may at any time direct a sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt; and hereafter the State shall not become a stockholder in any bank. . . .'

'8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years.'[1]

A third passage should be quoted in this connexion from the opinion of the Chief Justice, in order to make clear the sense in which public debt and previous liability are to be understood. On these points he said:

The 'public debt' and the 'previous liability' manifestly referred to a portion of the public debt of the original State of Virginia and liability for the money and property of the original State, which had been received by West Virginia under the acts of the General Assembly above cited, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia, though one may be involved in the other; while the provisions of sections 7 and 8 were obviously framed in compliance with the conditions on which the consent of Virginia was given to the creation of the State of West Virginia, and the money and property were transferred. From 1865 to 1905 various efforts were made by Virginia through its constituted authorities to effect an adjustment and settlement with West Virginia for an equitable proportion of the public debt of the undivided State, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it is charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia.

Refusal of West Virginia to pay its share.

The original jurisdiction of this court, was, therefore, invoked by Virginia to procure a decree for an accounting as between the two States, and, in order to a full and correct adjustment of the accounts, the adjudication and determination of the amount due Virginia by West Virginia in the premises.[2]

By leave of the Court the State of Virginia filed its bill on February 26, 1906, setting forth elaborately and in great detail the facts constituting the controversy, and a cause of action of which the Supreme Court could properly assume jurisdiction.

The State of West Virginia demurred to the jurisdiction of the Court and the demur was elaborately argued before the Court, March 11–12, 1907. On this statement of the case the facts properly pleaded in the bill of complaint were to be taken as true and admitted by the demurrer, so that the question before the Court was one of jurisdiction. That is to say, whether a controversy in the sense of the Constitution existed between the two States of which the Supreme Court could properly receive and lawfully entertain jurisdiction. Looking at it as an abstract question, the case was a money demand for which an accounting was prayed in order to determine the exact sums to which the State of Virginia would be entitled if West Virginia were taxed with liability. The Court had taken jurisdiction of a money demand in the case of the *United States* v. *North Carolina* (136 U.S. 211), decided in 1890; and of an accounting in the case of the *United States* v. *Michigan* (190 U.S. 379), decided in 1903. If the present case stood alone and was not the first of a hotly contested series, it would only be necessary to consider these two precedents which might be supple-

[1] *State of Virginia* v. *State of West Virginia* (206 U.S. 290, 316–17).
[2] *Ibid.* (206 U.S. 290, 317).

mented by others. But, as nine phases of this controversy between the same States depend upon the same cause of action and the facts constituting it, it is inadvisable to consider the case in the abstract or to divorce the question of jurisdiction from the special facts constituting the controversy, although it is not necessary in this connexion to consider the merits of the case. The principal contentions of Virginia will therefore be stated, together with the grounds of the demurrer interposed by West Virginia to the complaint.

Complaint of Virginia.

The complaint states that on January 1, 1861, Virginia was indebted approximately in the sum of $33,000,000, upon obligations and contracts made in connexion with the construction of works of internal improvement throughout its territory, then including the state of West Virginia ; that the greater part of this indebtedness was evidenced by bonds for moneys borrowed and used for these purposes, and that only a portion of the liabilities arising from contracts had not been covered by bonds issued for their payment ; that, in addition to these sums, there was other indebtedness, amounting approximately to $3,000,000, due to the Commissioners of the Sinking Fund and the Literary Fund for the State ; that a very large portion of the above indebtedness was due to improvements in the then western portion of the State now known as West Virginia ; that money and property amounting to millions of dollars were turned over by the so-called restored State of Virginia to the State of West Virginia upon its admission to the Union, June 30, 1863 ; that by Section 8 of Article 8 of the Constitution of West Virginia, an equitable portion of the public debt of Virginia, contracted prior to January 1, 1861, was assumed, to be ascertained by its Legislature as soon as practicable, a sinking fund to be constituted for this purpose, and the interest and principal to be paid within thirty-four years ; that the State of West Virginia, failing to comply with its obligation, created by its constitution, upon the faith of which the restored State of Virginia agreed to its admission to the Union, the State of Virginia proceeded to pay off its indebtedness, making arrangements with bondholders and giving outstanding obligations for the aggregate sum of over $71,000,000 ; that the State of Virginia had taken into its possession all the bonds and obligations and other evidences of indebtedness of the state, contracted and outstanding on and after January 1, 1861, except approximately one per cent. of such liabilities ; that in addition to sums actually expended, the State of Virginia was liable as guarantor on securities issued by internal improvements companies, which it was obliged to provide for and to settle ; that the State of West Virginia is about one-third as large, territorially, as the State of Virginia at the time of separation, and that at the same time the population of West Virginia was approximately one-third of that of the entire state ; that the State of West Virginia should assume and pay one-third of the outstanding indebtedness, including therein interest due and unpaid on January 1, 1861, and that an accounting should be had of the various transactions by which the indebtedness was contracted, so that debiting and crediting each of the parties in controversy, the amount of the indebtedness of the State of Virginia be fixed and the share thereof be determined which the State of West Virginia should contribute to the State of Virginia.

Demurrer of West Virginia denying jurisdiction.

To this bill, West Virginia demurred, alleging among other defects misjoinder of parties in that Virginia sued in her right as trustee for bondholders who were not joined as plaintiffs ; that the court had jurisdiction neither of the parties nor of the

subject-matter, inasmuch as the matters contained in the bill did not constitute a controversy in the sense of the Constitution ; that the court had no power to render or enforce a final judgement or decree in the matter, if it should assume jurisdiction ; that the allegations of the bill were not sufficient to entitle the plaintiff to relief in its own right as trustee to an account or discovery from the defendant and that the bill did not contain any prayer for judgement or decree or other final relief against the State of West Virginia.

This brief and necessarily imperfect summary of long, complex, difficult, and technical pleadings is nevertheless sufficient to show the origin and nature of the dispute and the general phases of settlement set forth in the complaint of Virginia against West Virginia, and the formal reasons stated by West Virginia against the jurisdiction of the court and the sufficiency of the complaint, admitting that a controversy of the kind required by the Constitution did and could exist between the two states concerning such matters.

It is not necessary to examine the flaws which West Virginia picked in the bill, for the Supreme Court has repeatedly held that in suits between States it will modify, if need be, the technical rules of equity pleading, in order to do substantial justice to the parties in litigation. And it is not necessary to consider the merits of the controversy inasmuch as the demurrer admits the facts well pleaded and subsequent cases deal at length with the various phases of this question. The only matter of importance for present purposes is the question of jurisdiction, because with that settled the court was in a position to allow or to overrule the demurrer—it actually did overrule it—and to require an answer on the part of West Virginia to the complaint, which it likewise actually did, thereby raising and bringing the controversy to an issue between the States, freed from technicalities, in order that the suit should be examined upon its merits and appropriate action taken in the premises.

Mr. Chief Justice Fuller, on behalf of the court, calls attention to two very important matters after the brief statement of the case which he made and which has already been quoted, to the effect that the facts stated in the bill do not constitute a controversy which could be heard and determined by the Supreme Court, and that the court should not render a final judgement or decree should it assume jurisdiction, because it could not enforce it. As an answer to the above objection, he enumerates a number of decisions of the Supreme Court in suits between States, saying that more could be cited in order to show that the facts constitute a controversy in the sense of the Constitution as interpreted by the court. And under the second heading he makes the very appropriate and conclusive answer that ' it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court ', that, if the state should repudiate the decree or judgement, the court would then consider the means by which it might be enforced, that consent to be sued was given when West Virginia was admitted to the Union, and that ' it must be assumed that the legislature of West Virginia would in the natural course make provision for the satisfaction of any decree that may be rendered '.[1]

A ' controversy ' exists.

The Court will presume compliance with its decree.

West Virginia strenuously insisted that the court could not take jurisdiction, even if the dispute were a controversy in the sense of the Constitution, because the two States had entered into a compact, approved by Congress, and therefore binding

[1] *State of Virginia* v. *State of West Virginia* (206 U.S. 290, 319).

upon the parties, to settle the dispute in a particular way, and that the court could not make an agreement for the parties or provide another method of settlement or adjustment than that upon which they themselves had determined. The compact or agreement to which counsel for West Virginia referred was the article of the Constitution already quoted, providing for the assumption of an equitable proportion of the indebtedness of the State of Virginia, to be ascertained by the legislature of West Virginia. The court would have been more impressed with this argument if the legislature of West Virginia had attempted to ascertain the liability and had taken means to extinguish it.

On this phase of the subject, Mr. Chief Justice Fuller said :

When Virginia, on August 20, 1861, by ordinance provided 'for the formation of a new State out of the territory of this State' and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861,' to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should 'ascertain the same as soon as practicable', it referred to the method of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the 'legislature shall ascertain' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained.[1]

And the Chief Justice, without pausing, stated only the truth and stated it fairly, when he continued, without a break, that :

And it may well be inquired why, in the forty-three years that have elapsed since the alleged compact was entered into, West Virginia has never indicated that she stood upon such a compact, and, if so, why no step has ever been taken by West Virginia to enter upon the performance of the duty which such 'compact' imposed, and to notify Virginia that she was ready and willing to discharge such duty.[2]

Nor was the court impressed by the contention of counsel that Virginia had no interest in the subject-matter of the controversy, because, by means of refunding, Virginia had assumed its share of the indebtedness, had paid it off or issued new obligations therefor and that it held the old bonds which were unfunded in trust for the holders or their assignees 'to be paid by the funds expected to be obtained from West Virginia as her "just and equitable proportion of the public debt".'[3] The Chief Justice thereupon stated that the legislation of Virginia in the matter of the funding and paying its indebtedness 'resulted in the surrender of most of the old bonds to Virginia, satisfied as to two-thirds, and held as security for the creditors as to one-third,' and made the very appropriate comment that the court did not care to take up and discuss this legislation, as it felt that these questions should not be passed upon on demurrer. For the reasons which have been stated, the court likewise refused to consider technicalities of pleading, as, for example, that the complaint of Virginia was multifarious, in that technicalities should not bar a just claim in a suit between States. And without holding that the bill could be considered multifarious, the court stated that it could not 'properly be regarded as seeking in chief anything more than a decree for "an equitable proportion of the public debt of the

Technical objections to the bill rejected.

[1] *State of Virginia* v. *State of West Virginia* (206 U.S. 290, 320–1).
[2] *Ibid.* (206 U.S. 290, 321).
[3] *Ibid.* (206 U.S. 290, 321).

Commonwealth of Virginia on the first day of January, 1861".' The court likewise considered the matter of misjoinder of parties and misjoinder of causes of action, as surplusage, and that in any event consideration thereof might wisely be postponed until final hearing. The court was satisfied in this phase of the case to limit itself to the question of jurisdiction, and having come to the conclusion that it possessed jurisdiction from an examination of the authorities which it is not necessary to cite in this connexion, as the principal ones have already been produced in this narrative. Anxious to do justice to both parties, not only to the plaintiff, whose case was in, but to the defendant, whose answer might modify the case as presented by the complaint, the court overruled the demurrer without prejudice to any question, of which the defendant might take advantage, and gave the defendant leave to answer the complaint of Virginia by the first month of the next term.

Demurrer overruled without prejudice.

63. State of Virginia v. State of West Virginia.

(209 U.S. 514) 1908.

The demurrer interposed by the State of West Virginia in the action against it, begun by Virginia to ascertain the equitable share of the debt which the former State should assume and pay to the latter, was overruled and leave given to answer. West Virginia availed itself of the leave and filed its answer. The proceedings thereafter were in accordance with the prayer of complainant's bill, and it is therefore quoted in aid of a correct understanding of the case and of the proceedings to be had in connexion with it :

Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same ; that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right and as trustee as aforesaid ; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth ; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court ; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States ; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises ; and that all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet.[1]

Prayer of Virginia's bill.

Although the demurrer was overruled without prejudice, that is, saving to the defendant any advantages at the hearing which the defendant might properly claim under a demurrer, as the court was unwilling to decide the case solely upon it, the litigating States considered that, in fact if not in form, the demurrer was overruled,

[1] *State of Virginia* v. *State of West Virginia* (206 U.S. 290, 306).

and might be considered as out of the case. West Virginia, therefore, presented its answer, and, in pursuance of the prayer of the bill, the nature and requirements of the case, counsel for both States submitted and sustained on argument forms of decree referring the controversy to a master. This is the usual course on a bill for an accounting between private litigants, as the court cannot suspend its other business in order to examine detailed and complicated accounts, even if the judge were competent to act as an expert accountant, as one is needed in such a matter.

It was agreed that a master be appointed to examine the evidence in the possession of both States, in order to ascertain the entire indebtedness of the State of Virginia on the 1st day of January 1861, the amounts with which one or the other should be credited or debited, or both, and to determine the equitable amount which West Virginia should assume and satisfy: the forms of decrees were similar although not identical; the differences went rather to matters of procedure than to a question of principle, and were concerned largely with paragraphs 3 and 4 of complainant's and paragraph 7 of defendant's draft. This phase of the subject is purely technical, and the purpose of the drafts was to lay before the court the views of opposing counsel, in order that the court might take note of them in the decree which it was to frame for the direction of the master. It seems inadvisable to note differences of detail, when the principle was agreed on, and therefore the decree of the court is reproduced *in extenso*, not merely for the convenience of the reader but as the model of procedure to be followed in controversies of this kind, whether they be between States of the American Union or nations of the society of nations.

Decree for an account.

The decree of the court as announced by the Chief Justice (not mentioning him by name, as is the custom when purely formal action is taken) was announced on May 4, 1908. The first part of the decree lays down expressly the principles which shall guide the master—Charles E. Littlefield, formerly Attorney-General and member of Congress from Maine, then engaged in the practice of law in the city of New York—in the difficult and intricate questions which it became his duty to examine, and, inferentially, the principles of liability of each of the litigating parties. This portion of the decree is as follows:

This cause having been heard upon the pleadings and accompanying exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated, to ascertain and report to the court:

1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.

6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

7. The amount and value of all money, property, stocks, and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof.

The answers to these inquiries to be without prejudice to any question in the cause.[1]

On June 1 of the same year a motion was made to amend the second paragraph, but it only resulted in the change of a word, substituting 'the extent and assessed valuation of the territory' for the phrase which originally ran 'the extent and value of the territory'.

It is to be observed that the answers to the inquiries were to be without prejudice, the meaning of which was that the answers were to be the findings of the master, and that, although they bound him, they did not bind counsel or court; for counsel could take exception to any or all of them, argue and debate the matter before the court when the report of the master was up for consideration, and the court itself could accept, reject, or modify the report in accordance with the views of counsel or with its own judgement. The accounting was a preliminary and indispensable proceeding, but it was only a step in the case.

If the decree had stopped with the first seven numbered paragraphs, the master could indeed have considered himself as required to produce proverbial bricks without straw, for without the co-operation of the States he could not hope to present a report worthy of the court's consideration. Therefore, the decree thus proceeds, requiring the co-operation of the States in litigation:

The States ordered to produce all documents.

It is further ordered that the Commonwealth of Virginia and the State of West Virginia shall each, when required, produce before the master, upon oath, all such records, books, papers and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts, or any of them.

And the master is authorized to make, or cause to be made, such examination as he may deem desirable of the books of account, vouchers, documents and public records of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records, published by authority of the Commonwealth of Virginia prior to the seventeenth day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.[2]

In addition, the master was vested with certain defined powers and authorized to employ competent help; sums of money were ordered to be deposited to meet these

[1] *State of Virginia* v. *State of West Virginia* (209 U.S. 514, 534–6).
[2] *Ibid.* (209 U.S. 514, 536).

expenses, and the master was further authorized to avail himself of the Attorneys-General of the two States in making the notices which might be required in connexion with the decree :

The master empowered to call witnesses, &c.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered, subject to the approval of the Chief Justice, to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of five thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree ; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal shall receive such commission for his services in receiving and disbursing the funds so deposited with him as may be allowed by the court, and he will make a report of his transactions, receipts and disbursements in the premises.

Any notices to be given in connection with the execution of this decree may be given by and to the Attorneys-General of the respective States.[1]

Large bodies move slowly, and States are large bodies ; and even individuals, engaged in a great cause, are sometimes led to follow the example of their betters. Therefore, to bring this controversy to an end, which had already lasted some forty years, the court enjoined speed upon the master, in order that his report might be presented at the earliest moment consistent with accuracy, the case be considered by counsel and court, and the cause itself progress toward a conclusion. Therefore the decree further and finally provided that :

The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court.

And the court reserves the consideration of the allowance of interest ; of the costs of this suit, and all further directions until after the master has made his report ; either of the parties to be at liberty to apply to the court as they shall be advised.[2]

64. State of Washington v. State of Oregon.

(211 U.S. 127) 1908.

On February 26, 1906, the State of Washington, one of the youngest of the States of the American Union, filed its complaint against the State of Oregon, its neighbour of the South, and itself one of the younger States, in order to determine

[1] *State of Virginia* v. *State of West Virginia* (209 U.S. 514, 536–7).

[2] *Ibid.* (209 U.S. 514, 537). For the succeeding phase of this case see *State of Virginia* v. *State of West Virginia* (220 U.S. 1), *post*, p. 486.

the boundary line between them. The pleadings proper in such cases were filed ; by consent of the parties testimony was taken before a commissioner, and on these pleadings and proofs the case was argued and submitted to the decision of the Supreme Court. A boundary dispute.

In order to understand the dispute between the States in controversy, it will be advisable to quote the description of the northern boundary of Oregon and of the southern boundary of Washington at the date of their admission into the Union. On August 14, 1848, the Territory of Oregon was established, and on March 2, 1853, the Territory of Washington, including that portion of Oregon Territory north of the middle of the main channel of the Columbia River. On February 14, 1859, the balance of the Oregon Territory was admitted as a State of the Union, and itsboundary, as far as it is material to the present controversy, was stated as follows : History of the case. Admission of Oregon, 1859.

' Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same ; thence northerly, at the same distance from the line of the coast, lying west and opposite the State, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River ; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla.' [1] Definition of the boundary.

On February 22, 1889, an act was passed, appropriately on Washington's Birthday, providing for the admission of the State of Washington. On November 11, 1889, the President, in pursuance of Section 8 of this statute, issued his proclamation, declaring Washington to be duly admitted into the Union. The portion of the boundary material to the present discussion is thus described in the constitution of that State, approved by Congress, to which body the constitution of a proposed State is submitted for approval, and must be approved, before that State is admitted : Admission of Washington, 1889.

Beginning at a point in the Pacific Ocean one marine league due west of and opposite the middle of the mouth of the north ship channel of the Columbia River, thence running easterly to and up the middle channel of said river and where it is divided by islands up the middle of the widest channel thereof to where the forty-sixth parallel of north latitude crosses said river, near the mouth of the Walla Walla River.[2] Definition of the boundary.

It will be observed that the description of the northern boundary of Oregon, contained in the act of Congress admitting it as a State, is so similar as to be practically identical with this description.

The dispute between the two States is due to the fact that there are two entrances to the Columbia River, both of which were navigable and indifferently used at the time of the admission of Oregon as a State, and of approximately the same depth. As Mr. Justice Brewer says, in delivering the unanimous opinion of the Court, ' the use of either channel depended largely upon the prevailing wind, so that it would be hard to say which was the most important, so surpassing in importance the other as to be properly called the main channel.' [3] One mentioned in the description was properly called from its situation ' northern ' ; the other, not mentioned in the act of Congress or the constitution, the ' southern ' channel. In the course of years, it is impossible to say just when, as the change appears to have taken place so slowly Two similar entrances to the Columbia River. Gradual changes in the channels.

[1] *State of Washington* v. *State of Oregon* (211 U.S. 127, 128).
[2] *Ibid.* (211 U.S. 127, 128–9).
[3] *Ibid.* (211 U.S. 127, 135).

as to be imperceptible, the northern channel became less navigable and seldom used by vessels of the largest size, so that the State of Washington found itself using the southern channel which had become the main avenue of commerce. In order to reach the ocean its shipping was obliged to pass, not through a highway common to both States, but within a channel to the south of Sand Island claimed by Oregon to be within the exclusive jurisdiction of that State.

Congress might have chosen either the middle of the north or of the south channel as a boundary between the two States, but instead of so doing it specifically selected the north ship channel, thereby excluding the southern channel, and as was natural in such a case, the point from which the line was to be drawn dividing Oregon from the territory on the north was ' due west of and opposite the middle of the mouth of the north ship channel of the Columbia River '. In the Constitution of Washington the line was to be drawn at a ' point . . . due west of and opposite the middle of the mouth of the north ship channel of the Columbia River '. In each case the north ship channel is expressly chosen in preference to the south channel.

Grant of Sand Island by Oregon to the United States, 1864.

These facts would seem to be decisive of the controversy, but there is a transaction in 1864 on the part of Oregon, then a State, and of the United States, then possessed of the territory of Washington, not admitted as a State until 25 years later. On October 21, 1864, Oregon passed an act granting to the United States ' all right and interest of the State of Oregon, in and to the land in front of Fort Stevens and Point Adams situate in this State, and subject to overflow in high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this State ; the said island being subject to overflow between high and low tide '. The United States accepted the grant, which it could not or would not have done if it had possessed title to the subject matter of the grant, thus recognizing Sand Island to be within the jurisdiction of Oregon, and as a necessary consequence, that the territory to the south of Sand Island was also within that State's jurisdiction.

Washington pleads the doctrine of the *thalweg* (*vide* p. 419, *ante*).

To overcome the provisions of the Act of Congress admitting Oregon, and the statement in the Constitution of Washington as to the effect of the grant of said island to and its acceptance by the United States, counsel of the State of Washington attempted to set up a doctrine applicable when the middle of a river has been made the boundary between States, that ' When a navigable river constitutes the boundary between two independent States, the line, defining the point at which the jurisdiction of the two separates, is well established to be the middle of the main channel of the stream. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction '. In support of this contention Counsel quoted the case of *Iowa* v. *Illinois* (147 U.S. 1), decided in 1893 ; *Missouri* v. *Nebraska* (196 U.S. 23), decided in 1904 ; and *Louisiana* v. *Mississippi* (202 U.S. 1), decided in 1906.[1]

Judgement of the Court in favour of Oregon.

Mr. Justice Brewer, without questioning the authority of these cases, had no difficulty in showing that they were not in point :

But in these cases the boundary named was ' the middle of the main channel of the river ', or ' the middle of the river ', and it was upon such a description that it

[1] *State of Washington* v. *State of Oregon* (211 U.S. 127, 129).

was held that in the absence of avulsion the boundary was the varying center of the channel. But there is no fixed rule making that the boundary between States bordering on a river. Thus, the grant of Virginia, of all right, title and claim which the said commonwealth had to the territory northwest of the River Ohio, was held to place the boundary on the north bank of the river. *Handley's Lessee* v. *Anthony*, 5 Wheat. 374, in which the subject is discussed by Mr. Chief Justice Marshall. See also *Howard* v. *Ingersoll*, 13 How. 381. Now, if Congress in establishing the boundary between Washington and Oregon had simply named the middle of the river, or the center of the channel, doubtless it would be ruled that the center of the main channel, varying as it might from year to year through the processes of accretion, was the boundary between the two States. That Congress had the propriety of such a boundary in mind is suggested by the terms of the act establishing the territorial government of Washington, passed March 2, 1853, c. 90, 10 Stat. 172, in which 'the middle of the main channel of the Columbia River' was named as the boundary. However, as we have seen, when Congress came to provide for the admission of Oregon (doubtless from being more accurately advised as to the condition of the channels of the Columbia River) it provided that the boundary should be the middle of the north channel. The courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel. That remains the boundary, although some other channel may in the course of time become so far superior as to be practically the only channel for vessels going in and out of the river.[1]

The Court cannot change the boundary prescribed by Congress.

The learned Justice further said:

These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the States bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter in the course of years becomes the most important and properly called the main channel, of the river.[2]

The conclusion, therefore, of the Court was necessarily, as stated by Mr. Justice Brewer, that 'the boundary between the two States is the centre of the north channel, changed only as it may be from time to time through the processes of accretion'.[3]

The international aspect of this case is clear without comment, as a dispute of this kind may arise between nations as well as States, whenever the channel of a river, made the boundary between them, either ceases to be navigable or is deserted by commerce for another branch or channel of the same stream. In such a contingency the case of *Washington* v. *Oregon* (211 U.S. 127) will be a precedent, ready to the hand of statesman, lawyer, and judge.

65. State of Missouri v. State of Kansas.

(213 U.S. 78) 1908.

The controversy in the case of *Missouri* v. *Kansas* (213 U.S. 78), decided in 1908, is briefly yet adequately stated in the following passage from the opinion of Mr. Justice Holmes, speaking for a unanimous court:

This is a bill to establish the western boundary of the State of Missouri for a short distance above Kansas City in that State. The object of Missouri is to

[1] *State of Washington* v. *State of Oregon* (211 U.S. 127, 134–5).

[2] *Ibid.* (211 U.S. 127, 136).

[3] *Ibid.* (211 U.S. 127, 136). For the final phase of this case see *State of Washington* v. *State of Oregon* (214 U.S. 205), *post*, p. 468.

Dispute about an island in the Missouri River, due to a gradual change in the river bed.

maintain title to an island of about four hundred acres in the Missouri River, now lying close to Kansas City, Missouri, and Kansas City, Kansas. The State of Kansas claims the same island by answer and what it terms a crossbill. A few words will explain the issue between the parties. When Missouri was admitted to the Union its western boundary at this point was a meridian running due north. There was land between a part of this line and the Missouri River. By treaty with the Indians and act of Congress on the petition of Missouri, that State was granted jurisdiction over such land and its boundary was extended to the Missouri River. Since that time the river had been moving eastward by gradual erosion, and at the place in controversy has passed to the east of the original line. The land in question lies to the east of the line and the claim of Missouri is that, whatever the change in the river, its jurisdiction remains to that line.[1]

History of the boundary.

The question involved in this case is interesting, but not difficult to decide, because, in anticipation of the grant of a triangular strip of land lying between its northern boundary extended due west to the Missouri River and between that river on the west, and a line due north from the middle point of the intersection of the Kansas and Missouri River, the State of Missouri, in the session of its legislature of 1834–5, amended its constitution in order 'that the boundary of the State be so altered and extended as to include all that tract of land lying on the north side of the Missouri River, and west of the present boundary of this State, so that the same shall be bounded on the south by the middle of the main channel of the Missouri River, and on the north by the present northern boundary line of the State, as established by the Constitution, when the same is continued in a right line to the west, or to include so much of said tract of land as Congress may assent'.[2] The act of Congress approved June 7, 1836, provided that 'when the Indian title to all the lands lying between the State of Missouri and the Missouri River shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the State of Missouri, and the western boundary of said State shall be then extended to the Missouri River'.[3] On December 16, 1836, Missouri assented to this act of Congress, and in the meantime, on September 17 of that year, a treaty was made with the Indians, whereby they released their claims to the land in question; and on March 28, 1837, the President, pursuant to act of Congress, declared the Indian title to the lands extinguished.

That the river was to be the western boundary of Missouri and that, on familiar principles of law, the jurisdiction of the State of Missouri should extend to the middle of the river, is made clear by a reference to the express desire of the State on the one hand and of the Congress on the other. In 1831 the General Assembly of Missouri transmitted a memorial to the Congress, in which it requested its boundary to be extended westward to the Missouri River, on the ground that the territory between the river and its then western boundary was inhabited by Indians, and conflicts were to be feared on the frontier unless there were interposed 'whenever it is possible, some visible boundary and natural barrier between the Indians and the whites'; that the Missouri River would become this visible boundary and natural barrier 'by extending the northern boundary of this State in a straight line westward until it strikes the Missouri, so as to include within this State a small district of country between that line and the river'. Congress acted at the request of and for the reasons stated by Missouri, and the strip of land acquired by treaty from the Indians was

[1] *State of Missouri* v. *State of Kansas* (213 U.S. 78, 81–2).
[2] *Ibid.* (213 U.S. 78, 84).
[3] *Ibid.* (213 U.S. 78, 84).

granted by the Congress to Missouri in order that the Missouri River might be the 'visible boundary and natural barrier between the Indians and the whites'.[1]

Such was the intent of the State before the acquisition of the territory. Since that date the State of Missouri has evidenced its understanding that the middle of the Missouri River was the boundary, not that it acquired the river itself, by a succession of statutes relating to the river counties in this part of the States, all of which adopted as boundary the middle of the main channel of the river. In addition to this action of the legislative and executive branches of the Government, the State judiciary, in the case of *Cooley* v. *Golden* (52 Mo. App. 229), decided in 1893, has held the middle of the river to be the boundary between that part of the State and Kansas.

The decision in this case is as interesting as it is important, in that the dispute determined the boundary of Atchison County, formed out of the territory between the parallel of latitude and the Missouri River granted by Congress to the State of Missouri in 1836. After stating that the case was an action of forcible entry and detainer, brought before a Justice of the Peace in Atchison County, presiding Judge Smith said:

Mid-channel line adopted by the Missouri Courts.

By the act of Congress, approved June 7, 1836, United States Statutes at Large, 34, entitled 'An Act to extend the western boundary of the State of Missouri to the Missouri River', it was provided that, when the Indian title to all the lands lying between the State of Missouri and the Missouri River should be extinguished, the jurisdiction over said lands should be thereby ceded to the State of Missouri. It is to be observed that the act ceded the land between the old State line and the river, and the extension of the boundary was to the river, not to the bank, thus making the natural water-course the boundary; and the general rules, construing such words of cession as shown by the adjudged cases, carry that boundary to the centre of the channel. *Benson* v. *Morrow*, 61 Mo. 345; *Jones* v. *Soulard*, 24 How. 41; *Howard* v. *Ingersoll*, 13 How. 381; *Railroad* v. *Devereux*, 41 Fed. Rep. 14; *Missouri* v. *Iowa*, 7 How. 660. And this seems to have been the intention of Congress; for it will be seen by reference to the act providing for the admission of the Territory of Nebraska into the Union that one of the boundaries of the State so admitted should be from the junction of the Niobrara River down the middle of the channel of the latter river following the meanderings thereof, &c. 13 United States Statutes at Large, 47. It would be unreasonable to suppose that Congress intended to limit the extension of the territorial jurisdiction of the State of Missouri to the bank of the Missouri, and thus leave a sort of neutral territory between the Missouri shore and the middle of the channel of the river over which neither the States of Missouri nor Nebraska had jurisdiction.

The Constitution of Missouri, section 1, article 1, declared that the boundaries of the State as heretofore established by law are hereby ratified and confirmed; so that it is not to be doubted that Congress by the ceding act extended the northern boundary line of the State to the middle of the channel of the Missouri River, and from thence down the river to the middle of the Kansas River. Act of Congress of March 6, 1820, for the admission of Missouri; Revised Statutes, 1889, 47. In the cession act of June 7, 1836, is embraced what is commonly known as the 'Platte purchase', consisting of a number of counties, among which is Atchison, situate in the northwest corner of the State.

The State was thus committed, both before and since the acquisition of the territory, to this theory of construction. In view of this fact it requires no citation of authorities for the statement that the boundary follows the gradual shifting of

[1] *State of Missouri* v. *State of Kansas* (213 U.S. 78, 83).

The line follows the change of the stream.

the stream, and that the island, produced by a gradual and natural process in and by the river, belongs to the State of Kansas if it be, as in this case it was, on the Kansas side of the channel.

This was the view of the Supreme Court, as expressed by Mr. Justice Holmes in the last lines of his opinion :

Judgement of the Court in favour of Kansas.

It follows upon our interpretation that it is unnecessary to consider the evidence as to precisely where the line as surveyed ran from opposite the mouth of the Kansas or Kaw. If the understanding both of the United States and the State had not been a wholesale adoption of the river as a boundary, without any niceties, still, as the cession 'to the river' extended to the center of the stream, it might be argued that even on Missouri's evidence there probably was a strip ceded at the place in dispute. But from the view that we take such refinements are out of place. The act has to be read with reference to extrinsic facts because it fixes no limits except by implication. We are of opinion that the limit implied is a point in the middle of the Missouri opposite the middle of the mouth of the Kaw.[1]

66. State of Washington v. State of Oregon.

(214 U.S. 205) 1909.

The decree of the Supreme Court in the first case of *Washington* v. *Oregon* (211 U.S. 127), decided in 1908, was unsatisfactory to the former State, but inasmuch as the Supreme Court is, as the name implies, supreme, having no judicial tribunal above it to which it is inferior, the decision is to be taken as final. This does not mean, however, that the decision may not be questioned in subsequent cases involving the same or similar principles, or that a re-examination might not result in a different decision. But the judgement of the court in a particular case is decisive of the rights of the parties, unless at their instance it is modified or reversed, and in a subsequent proceeding to which they are parties. The court may be petitioned for a rehearing, and in the present case the State of Washington, availing itself of this right of the defeated litigant, asked a rehearing upon the following points, as stated in the official report :

Petition by Washington for a rehearing.

I. The court erred in finding and holding that the present ship channel at the entrance to the Columbia River was the old south channel.

II. The court erred in finding and holding that the former north channel still subsisted to the northward of Sand Island, and that the boundary between the States of Washington and Oregon was to the northward of said Sand Island.

III. The court erred in not finding and holding that the present single channel at the entrance to the mouth of the Columbia River was as much the former north channel of the entrance to said river as it was the former south channel, and in not giving effect as a matter of law to the said combined single channel as the boundary between the two States.

IV. The court erred in finding and holding that the Columbia River inside the entrance was not divided by islands and in finding and holding that the testimony failed to show anything calling for consideration in respect to the ownership of the said islands.[2]

Counsel for the State of Washington appeared and argued for a reconsideration of the case for the reasons specified, and counsel for Oregon appeared in support of the previous decision and argued against the allowance of the petition. The court,

[1] *State of Missouri* v. *State of Kansas* (213 U.S. 78, 85).
[2] *State of Washington* v. *State of Oregon* (214 U.S. 205, 205–6).

necessarily forced to reconsider the case in fact, although perhaps not in form, affirmed its decision, denied the petition for a rehearing, which would in effect have been a retrial of the case, and ventured to suggest, as the controversy between the two States was acute, that the consent of the Congress of the United States be requested to enable the States of Washington and Oregon to enter into an agreement or compact, by the terms of which the boundary in dispute should be adjusted to their mutual convenience and satisfaction.

Judgement of the Court re-affirming the decision.

Mr. Justice Brewer delivered the opinion of the court upon the petition for a rehearing of the case of *Washington* v. *Oregon* (214 U.S. 205), decided in 1909, and as he had delivered the opinion of the court in the previous phase of the question, he was especially qualified to do so. It is unnecessary to state what has been said on so many occasions, that the court approached the case upon rehearing anxious not merely to see but to do justice in the premises, especially observable in its attitude toward suits to which States are parties, and its statements concerning them and their rights. The present was no exception, a fact thus stated by Mr. Justice Brewer after recounting the antecedents of the case :

> On examination of that petition we entered an order directing that the parties have leave to file briefs upon the questions. They have done so, and we have re-examined the case with great care.[1]

Of the four points for rehearing, Mr. Justice Brewer dealt with two in his opinion, inasmuch as the two cover the ground of the four. The first, as stated by Mr. Justice Brewer, was ' whether the boundary near the mouth of the Columbia River was and is the channel north of Sand Island '. On this point the learned Justice stated for the court :

> We held that it was, and with that conclusion we are still satisfied—

so satisfied, indeed, that the court did not find it necessary to repeat the reasoning by which the conclusion was reached.[2] Mr. Justice Brewer, however, referred to the very interesting case of *Missouri* v. *Kentucky* (11 Wallace, 395, 411), decided in 1870, with which the reader is familiar, ' as much in point '. The Mississippi River is the boundary between these States, as it was the boundary by the treaty of 1763 between France, Spain, and England, and by the treaty of 1783 between Great Britain and the United States ; and at the time of the admission of Missouri as a State of the Union in 1820, the main channel of the Mississippi had been, at least to that period, west of a tract of land called Wolf Island, whose ownership was claimed by each State. Since the admission of Missouri, the Mississippi had veered to the east, so that the main channel of the stream was to the east of the island instead of to the west thereof. Notwithstanding the change of channel, Mr. Justice Davis said for a unanimous court :

> It follows, therefore, that if Wolf Island in 1763, or in 1829, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner.

[1] *State of Washington* v. *State of Oregon* (214 U.S. 205, 214). [2] *Ibid.* (214 U.S. 205, 214).

Upon this statement of facts Mr. Justice Brewer thus comments in behalf of the court whose opinion he delivered:

The boundary is the varying centre of the north channel.

So whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel. *Jeffries* v. *East Omaha Land Co.*, 134 U.S. 178; *Nebraska* v. *Iowa*, 143 U.S. 359; *Iowa* v. *Illinois*, 147 U.S. 1; *Missouri* v. *Nebraska*, 196 U.S. 23; *Louisiana* v. *Mississippi*, 202 U.S. 1.[1]

The second of the two points considered by the court related to the failure of the court to find islands in the channel of the Columbia River, because, after the boundary has entered the north ship channel it continues, according to the act of Congress admitting Oregon as a State, 'thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof to a point near Fort Walla Walla'. In reference to this matter, which was not material, inasmuch as the dispute before the court referred to the entrance of the Columbia River, not to the course thereafter, Mr. Justice Brewer had said:

The testimony fails to show anything calling for consideration in respect to the last clause in the quotation from the boundary of Oregon. The channel is not divided by islands.

In the petition for a rehearing counsel for Washington alleged that, in the bill and the answer, a controversy was stated and admitted concerning the jurisdiction, as Mr. Justice Brewer summarized it, over numerous islands and sands in Columbia River, sixteen of which are enumerated by name. The court, however, was not impressed by the argument of counsel concerning the islands, the learned Justice saying that 'while sixteen islands and sands are mentioned, yet in the brief filed by the plaintiff on the application for a rehearing it is stated that, outside of Sand Island, the title to which is, as shown in the former opinion settled by the decision of the first question, only two, Desdemona Sands and Snag Island, can be called islands, the remainder being entirely submerged and only visible at low tide. These two, therefore, are all that can come within the definition in the boundary'.[2]

The contention of counsel in the matter of islands did not affect the boundary between the States. It did not cause the court to determine the middle of the channel of the river as affected by the presence of islands, inasmuch as, in this portion of the river, there were two islands (Sand Island and Desdemona Sands) within the jurisdiction of Oregon. The third, Snag Island, was granted by Oregon to private parties in 1877, and the State of Washington had neither questioned this transaction nor attempted to interfere with the jurisdiction of Oregon over the island.[3]

As the title to these islands, properly or improperly so called, was held to be in Oregon, it was unnecessary to determine the meaning of 'the widest channel' of the river, but as the question was raised by counsel, the court referred

[1] *State of Washington* v. *State of Oregon* (214 U.S. 205, 215).
[2] *Ibid.* (214 U.S. 205, 215).
[3] *Ibid.* (214 U.S. 205, 216–17).

to it in terms of future if not of present importance. Thus, Mr. Justice Brewer said:

Definition of 'widest channel'.

We agree with counsel that the term 'widest channel' does not mean the broadest expanse of water. There must be in the first instance a channel—that is, a flow of water deep enough to be used and in fact used by vessels in passing up and down the river; but it does not mean the deepest channel but simply the widest expanse of water which can reasonably be called a channel.[1]

The court recognized the difficulty of determining a boundary running through a river of great width, three miles or so at certain places, whose bed is largely of sand and whose channel had been naturally affected by the flow of the water and also of late years by the jetties constructed by the Government in order to facilitate navigation. And Mr. Justice Brewer stated in this connexion that Congress had apparently been impressed with this difficulty, inasmuch as it had granted to Washington and Oregon concurrent 'jurisdiction in civil and criminal cases upon the Columbia River'. But in accordance with the holding of the court in *Nielson* v. *Oregon* (212 U.S. 315, 320), decided a year previously, a provision of this kind was a matter of convenience, and was not a determination of the boundaries between the States, Mr. Justice Brewer, who delivered the opinion of the court in that case, saying:

Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel.

The Court suggests an agreement between the States.

As indicating the solicitude of the Supreme Court in cases involving disputes between States, and which, without renouncing judicial functions, leaves the court betimes to act in an advisory capacity as counsel for both, the concluding portion of Mr. Justice Brewer's opinion may be quoted without paraphrase or comment:

We may be pardoned if, in closing this opinion, we refer to the following:

'Joint Resolution [approved January 6, 1909] to enable the States of Mississippi and Arkansas to agree upon a boundary line and to determine the jurisdiction of crimes committed on the Mississippi River and adjacent territory.

'*Resolved* . . ., That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the other such tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Mississippi River.' . . .

Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction.[2]

[1] *State of Washington* v. *State of Oregon* (214 U.S. 205, 216).
[2] *Ibid.* (214 U.S. 205, 217–18).

67. State of Maryland v. State of West Virginia.

(217 U.S. 1) 1910.

There are only three instances to be found in the records of the Supreme Court, in which the State of Maryland appeared as a suitor against a State of the Union, and prosecuted the controversy to a final hearing, resulting in a decree or judgement. In each instance, the State of West Virginia was defendant.

It appears, according to the statement of Mr. Justice Day, in the case of *Maryland* v. *West Virginia* (217 U.S. 1), decided in 1910, that as far back as October 1834, the State of Maryland filed a bill in the Supreme Court, against the State of Virginia, which, however, was subsequently dismissed without any action being taken upon it.[1] The controversy was apparently the controversy before the Court in the present case, which in the meantime had grown acute; so acute, indeed, that resort was again made to this august Tribunal, in order that the dispute concerning this portion of its boundaries with West Virginia, the successor in interest of the State of Virginia, might be judicially determined, as other, and even more perplexing boundary disputes between many of the States of the Union, including even the United States itself, had been, by the Supreme Court.

A boundary dispute.

The territory involved was trifling, but the principle was not. It is always the same, whether the case be large or small, concern land or money, or questions of sovereignty; for judicial settlement is no respecter of persons, or of property, or even of sovereign rights.

History of the boundaries.

On June 20, 1632, Charles the First of England granted to the second Lord Baltimore, a large tract of territory named 'Maryland', in honour of the then Queen of England, and from the charter a few lines are quoted, as they contain within them the germ of the controversy. The charter defines the boundary of the Colony, now the State of Maryland, as:

Charter line of 1632.

> going from the said estuary called Delaware Bay in a right line in the degree aforesaid 40 N. l. to the true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river and following it to where it faces the western and southern coasts, as far as to a certain place called Cinquack situate near the mouth of the same river, where it discharges itself in the aforenamed Bay of Chesapeake, and then by the shortest line as far as the aforesaid promontory or place called Watkin's Point.[2]

The northern boundary of Maryland and the line of separation between it and Pennsylvania, were determined by Lord Hardwicke in the famous case of *Penn* v. *Lord Baltimore* (1 Vesey Sr.), decided in 1750, and the line as drawn, known as 'Mason and Dixon's Line', from the names of the surveyors, is famous in history, not so much as the boundary between Pennsylvania and Maryland, but as the demarcation between freedom and slavery.

The western boundary, however, between Maryland and Virginia was not directly or unequivocally determined in Colonial days, or indeed at any time before the decision of the present case in the Supreme Court, although from time to time attempts were made, and a general working agreement seems to have been reached from 1787 on, although the agreement, if such it can be called, was not of a formal nature.

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 32). [2] *Ibid.* (217 U.S. 1, 25).

Dispute as to the 'first fountain' of the Potomac.

The purpose of the State of Maryland in resorting to the Supreme Court, was to secure the location of 'the first fountain of the Potomac River', from which point a meridian ran north to Pennsylvania, separating Maryland from West Virginia, and the line following the Potomac River from this point eastward, separating Maryland on the north from West Virginia on the south. Maryland claimed that the first fountain of the river Potomac lay a little farther west than Virginia, and Virginia's successor, West Virginia, admitted, and that its true boundary lay farther to the south. These latter States claimed the first fountain lay a little to the east. The meridian lines drawn from these two points northward to Pennsylvania were about a mile and a quarter apart, and the distance from the farthest point south about thirty-seven miles to the Pennsylvania frontier. This was the first part of the dispute.

Dispute as to the Potomac line.

The second was as to the sense in which the Potomac was to be the boundary between the two States.

After the point of the true meridian was located at the first fountain of the river Potomac, the boundary line ran downward towards the south 'to the farther bank of the same river', to its mouth in Chesapeake Bay. Maryland claimed in accordance with its charter, not merely to the middle of the Potomac, but to the farther bank, meaning by that, the southern bank, and not merely to low, but to high-water mark. West Virginia maintained that the 'first fountain of the river Potomac', was farther to the east, and therefore claimed the strip of land about a mile and a quarter wide between lines due north from these points to Pennsylvania. In addition, West Virginia claimed not merely to the Potomac flowing between the two States, but to the northern bank of that stream.

To settle these two questions, the present suit was brought, and it may be said in this connexion, before proceeding to a discussion of the dispute, that the Supreme Court decided in favour of West Virginia's contention to the land, and Maryland's contention as to the Potomac.

Bill and cross-bill filed, 1891.

On October 12, 1891, the State of Maryland filed its bill against the State of West Virginia, invoking the original jurisdiction of the Supreme Court for the settlement of controversies between States in accordance with the grant of judicial power contained in the Constitution made by the States in conference in 1787, of which Maryland was one. The State of West Virginia filed an answer and cross-bill and the case was before the court.

The land in controversy between the two States was claimed by Garrett County of Maryland and by Preston County of West Virginia, and, as already stated, the boundary in controversy ran between the two States from the head-waters of the Potomac to the Pennsylvania line. The origin of the controversy began with the charter granted on June 20, 1632, by His Majesty King Charles I of England, to Cecilius Calvert, second Lord Baltimore, but the controversy itself did not break out until years thereafter, inasmuch as the region in which the western boundary of the State lay was unknown to geographers and was unsettled at the time.

The difference concerned the location of 'the first fountain of the river Potomac' from which the true meridian ran due north and south to Pennsylvania, and the conflicting claims of Maryland, on the one hand, and of West Virginia, as successor to the title of Virginia, on the other, to the Potomac River, Maryland claiming the Potomac to the farther bank thereof from the first fountain to the Bay, West Virginia

the Potomac to the north bank thereof during its course between Maryland and West Virginia.

The Province of Maryland thus bounded had difficulty with its neighbours, both in drawing and securing the recognition of the lines of its charter. Its relations to Delaware, then a part of Pennsylvania, on the east, and Pennsylvania, on the north, gave rise to the very famous case of *Penn* v. *Lord Baltimore* (1 Vesey Sen. 444; Vesey Sen. Sup. 194), decided in 1750, in which Lord Hardwicke decreed the line between the two colonies. The difficulties with Virginia to the south were many and serious, and on June 29, 1776, the first constitution of that State thus renounced its claims inconsistent with the charters of its neighbours:

> The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon.[1]

In addition to the charter and to the renunciation by Virginia of its claims inconsistent therewith, the bill of the State of Maryland, to quote its terms from the opinion of Mr. Justice Day, delivering the unanimous opinion of the court in this case, 'also recites complainant's title to the South Branch of the Potomac River. It avers the failure to settle the true location of the boundary line in dispute with West Virginia, which State succeeded to the rights and title of Virginia. The bill charges that the State of West Virginia is wrongly in possession of and exercising jurisdiction over a large part of the territory rightfully belonging to Maryland; that the true line of the western boundary of Maryland is a meridian running south to the first or most distant fountain of the Potomac River, and that such true line is several miles south and west of the line which the State of West Virginia claims, and over which she has attempted to exercise territorial jurisdiction.

> 'The State of West Virginia filed an answer and cross bill, in which she sets up her claim concerning the boundary in dispute between the States, and says that the true boundary line, long recognized and established, is the one known as the "Deakins'" line, and in the answer and cross bill she prays to have that line established as the true line between the States. She also alleges in her cross bill that the north bank of the Potomac River from above Harpers Ferry to what is known as the Fairfax Stone is the true boundary between the States; that West Virginia should be awarded jurisdiction over that portion of the river to the north bank thereof.'[2]

It should be said, in this connexion, that, in the briefs and arguments made on behalf of Maryland, counsel did not press the claim of their client to the south branch as the true boundary as marked by the Fairfax stone, but located the point at which the meridian should be drawn from a point in the north branch of the Potomac as marked by the so-called Potomac stone, placed in 1897, six years after the suit began. The claim to the northern and southern banks of the river, respectively made by

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 23).
[2] *Ibid.* (217 U.S. 1, 24).

Maryland and West Virginia, are to be regarded as incidents in the case, although they were decided by the court in favour of Maryland, as the controversy between the two States was primarily concerning the location of the point from which 'the true meridian of the first fountain of the river Potomac' should be drawn due north to Pennsylvania, thus determining the boundary between the States of Maryland and West Virginia.

The two sources of the Potomac.

An examination of the map of the region discloses that the Potomac divides near its source into two branches, or rather, that the Potomac is formed by the juncture of two small streams, known, respectively, as the North and the South branch ; the former rising in the Backbone Mountain and flowing south-easterly, the latter a few miles to the south, flowing west and north until its juncture with the other stream. The State of Maryland claimed that the northern branch was in reality the true fountain from which the meridian should be drawn due north ; opposing counsel did not deny that it might be so, or that if the question had been presented to the court for the first time the contention of Maryland might not prevail. However, a decree of the King in council in 1746 in a controversy between Lord Fairfax and the then colony of Virginia concerning the western boundary of the State, located it at a point on the south branch, marked two years later by the so-called Fairfax stone. This decision naturally bound Virginia. Maryland was not a party to it, but did not protest ; and the so-called Deakins line of 1786, from the name of the surveyor employed by Maryland, recognized the Fairfax stone as the starting-point ; and grants of property were apparently made thereafter with reference to that line. In view of this state of affairs the Court hesitated to decide the question by a mere reference to geography, Mr. Justice Day saying for his brethren :

Decree of the King in Council, 1746.

> It may be true that the meridian line from the Potomac Stone, in the light of what is now known of that region of country, more fully answers the calls in the original charter than does a meridian line starting from the Fairfax Stone. But it is to be remembered that the grant to Lord Baltimore was made when the region of the country intended to be conveyed was little known, was wild and uninhabited, had never been surveyed or charted, and the location of the upper part of the Potomac River was only a matter of conjecture.
>
> It is said, and the record tends to show, that the only map of the country then known to be in existence was one prepared and published by Captain John Smith, upon which only a very small part of the Potomac River is shown, and from which we get no light as to the true source and course of the upper reaches of the Potomac River.[1]

As a matter of fact, Potomac stone, the point claimed by Maryland, is only a mile and a quarter to the west of Fairfax stone, claimed by West Virginia, and the latter stone is apparently less than a mile and a quarter farther to the south. The distance due north from the Fairfax or Potomac stone to Mason and Dixon's line, separating Maryland from Pennsylvania, is less than thirty-seven miles, so that the dispute, it can be reasonably said, was greater than its subject-matter.

There are thus three matters to be considered in this case : first, the facts and circumstances leading to the location of the Fairfax stone ; second, the facts and circumstances attending and following the drawing of the Deakins line ; and third, the ownership of the Potomac.

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 26–8).

The 'Fairfax' grant, 1688.

In 1688 Charles the Second of England granted what is called the Northern Neck of Virginia to Thomas, Lord Culpeper, which subsequently became the property of Lord Fairfax, and is popularly, though not quite accurately, spoken of as the Fairfax grant. A more than passing reference to this grant is relevant to the present case, inasmuch as the region is described as 'all that entire tract, territory, or parcel of land situate, lying and being in Virginia in America, and bounded by and within the first heads or springs of the rivers of Tappahannock als. Rappahannock and Quiriough als. Patawamerck Rivers, the courses of said rivers from their said first heads or springs, as they are commonly called and known by the inhabitants and description of those parts and the bay of Chesapeake, together with the said rivers themselves. . . .'[1] The Northern Neck became subject to the jurisdiction of Virginia, and the settlement of its boundary was in the interest of that colony as well as of its neighbours. A dispute having arisen between the Governor and Council of Virginia, on the one hand, and Lord Fairfax on the other, his Lordship petitioned the King in Council for an order to settle the boundaries of his tract and for a commission to ascertain and mark the boundaries thereof. This order was made on November 29, 1733, and three years thereafter the Governor of Virginia appointed commissioners to act for the colony and Lord Fairfax commissioners to act in his own behalf. The subsequent proceedings are thus stated by Mr. Justice Day:

The instructions to the commissioners required them to make a clearer description of the boundaries in controversy, to make exact maps of the rivers Rappahannock and Potomac, and the branches thereof to the head or spring, so-called or known, and the surveys made by them with correct maps thereof to be laid before His Majesty. The commission adopted the North Branch of the Potomac River, then known as the Cohaungoruton, and after further proceedings, which are not necessary to recite in detail, and after a reference to the Lords of Trade and Plantations, a report was made which, among other things, stated that a line run from the first head or spring of the south or main branch of the Rappahannock River, to the first head or spring of the Potomac River is, and ought to be, the boundary line determining the tract or territory of land commonly called the Northern Neck. Ultimately the matter was laid before the King in Council, and commissioners were appointed to mark and run the line between the head spring of the rivers Rappahannock and Potomac, and the stone called the Fairfax Stone was planted in September, 1746, at the head spring of the Potomac River. In 1748 the location of the stone was approved by the Virginia assembly and the King in Council. This Fairfax Stone has been an important monument in settling and establishing boundaries since that time.[2]

The 'Fairfax Stone' planted, 1746,

and acknowledged by Maryland, 1872.

Mr. Justice Day points out, in his comment upon this passage, that the Fairfax Stone was 'recognized as a boundary point by the State of Maryland' when it separated the territory known as Garrett County from the western portion of Alleghany County in 1872, in accordance with the second section of Article 8 of the Constitution of Maryland of 1851, to determine whose western boundary the present suit was instituted.[3]

The second of the three matters considered by Mr. Justice Day in his opinion is the so-called Deakins line, which, although not a boundary, was drawn under the authority of Maryland. It appears to have been looked upon by the inhabitants of the region as the line between the two States, and it is not without recognition on

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 28).
[2] *Ibid.* (217 U.S. 1, 29–30).
[3] *Ibid.* (217 U.S. 1, 30).

the part of the State itself. The origin of the line antedates the Constitution, indeed the recognition of American independence, and is connected in a very intimate way with the war of the Revolution. In 1781 the State of Maryland appropriated land within Washington County, west of Fort Cumberland, to discharge its obligations to its officers and soldiers, and by a resolution of April 1787 the Governor and Council were requested 'to appoint and employ some skilful person to lay out the manors, and such parts of the reserve and vacant lands, belonging to this State, lying to the west of Fort Cumberland, as he may think fit and capable of being settled and improved, in lots of fifty acres each, bounded by a fixed beginning and four lines only, unless on the sides adjoining elder surveys; that the beginning of each lot be marked with marking irons, or otherwise, with the number thereof, and that a fair book of such surveys, describing the beginning of each lot by its situation, as well as number, be returned and laid before the next general assembly.' [1]

The 'Deakins line' drawn, 1788, under authority of Maryland.

Under this resolution one Francis Deakins was employed to make the survey. This he did, and accompanied his report, as stated in an act of the Maryland legislature of 1788, with 'a general plot of the county westward of Fort Cumberland', and he also returned two books, in which he entered certificates of all the lots surveyed by him.[2] It should be said, however, that the Deakins line was not regarded by the Legislature as the western boundary between Maryland and West Virginia, inasmuch as, in approving his survey, the Legislature 'enacted, that the line to which the said Francis Deakins has laid out the said lots, is in the opinion of the general assembly, far within that which this State may rightfully claim as its western boundary; and that at a time of more leisure the considerations of the legislature ought to be drawn to the western boundaries of the State, as objects of very great importance'.[3]

In a portion of the act referred to, not quoted, Deakins filed a map and two books, in which he entered certificates of all the lots surveyed by him, and the map put in evidence by the State of West Virginia shows a north and south line at its west side, marked: 'The meridian line and the head of the North Branch of the Potowmack River as fixed by Lord Fairfax.' This was in 1788. The date of the map could not be earlier than 1787 nor later than 1788, and, in the language of Mr. Justice Day, 'This could mean but one thing, and that is, an attempted meridian line north from the Fairfax Stone, located to the Pennsylvania line'.[4]

Negotiations between Maryland and Virginia, 1795–1854.

Pursuant to this suggestion, attempts were made from time to time to agree upon the line—in 1795, 1801, and 1810—but nothing seems to have come of these attempts. In 1818 Maryland passed an act proposing the appointment of a commission, as stated by Mr. Justice Day, 'to run a line from the most western source of the North Branch of the Potomac'.[5] In 1822 the legislature of Virginia expressed its willingness to appoint commissioners, but inasmuch as the instructions of the Virginia commissioners adopted the Fairfax stone as the boundary between the two States, the meeting of the commissioners resulted in failure to agree. In 1825 Maryland proposed that the Governor of Delaware act as umpire. In 1833 Virginia passed an act providing for commissioners to draw the line if Maryland should not appoint commissioners; and, as previously stated, a bill was filed in 1834 by the State of

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 32–3).
[2] *Ibid.* (217 U.S. 1, 33).
[3] *Ibid.* (217 U.S. 1, 34).
[4] *Ibid.* (217 U.S. 1, 34).
[5] *Ibid.* (217 U.S. 1, 32).

Maryland in the Supreme Court of the United States to determine the boundary, but it was subsequently dismissed 'without any action being taken thereon'. Finally, in 1852 and 1854, the States of Maryland and Virginia, respectively, took action which promised to result in an adjustment of the difficulty. The Maryland statute, authorizing its Governor to open a correspondence with the Governor of Virginia, states in the following language the reason for and the region in which the line should be drawn:

Whereas it is of great importance that the western territorial limit of the State of Maryland be clearly defined and her boundary be permanently established; and whereas, the true location of the western line of Maryland between the States of Maryland and Virginia beginning at or near the Fairfax Stone on the North Branch of the Potomac River, at or near its source, and running in a due north line to the State of Pennsylvania, is now lost and unknown and all the marks have been destroyed by time or otherwise; and whereas, the States of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits of ejectment are now pending in the Circuit Court of Alleghany County, in the State of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the State of Virginia, which cannot be justly settled without establishing said boundary line.

Therefore, Section 1. Be it enacted by the General Assembly of Maryland, that the Governor be and he is requested to open a correspondence with the governor of Virginia in relation to tracing, establishing and marking the said line, and in case the legislature of Virginia shall pass an Act providing for the appointment of a commissioner to act in conjunction with a commissioner on the part of Maryland in the premises, then and in such case, the governor be and he is hereby authorized and requested to appoint a commissioner who, together with the commissioner who shall be appointed on the part of Virginia, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments beginning therefor at the said Fairfax Stone and running thence due north to the line of the State of Pennsylvania.[1]

The Virginia statute of 1854 provided:

1. That the governor appoint a commissioner who, together with the Maryland commissioner, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments, beginning therefor at the Fairfax Stone, situated as aforesaid, and running thence due north to the line of the State of Pennsylvania.[2]

Each act contained identical provisions that the line thus determined and ratified by the legislatures of the respective States was to be fixed and established 'to remain for ever, unless changed by mutual consent' of the two States.

Pursuant to these acts, commissioners were appointed, and, upon application to the Secretary of War, Lieutenant Michler, of the United States Topographical Engineers, was detailed to draw the line. The result is thus stated by Mr. Justice Day:

The 'Michler line', 1859.

As directed in both the acts, Lieutenant Michler commenced his work at the Fairfax Stone, and ran a line northwardly, marking it at certain places. This line intersected the Pennsylvania line at a point about three-fourths of a mile west from the northern extremity of the Deakins line, which had been run in 1788, as we have already stated. There was a triangle between the Deakins and Michler lines, having its apex at the Fairfax Stone, and lines diverging thence, until there was a difference of three-fourths of a mile at the base of the triangle at the Pennsylvania line.

It appears that the commissioners of the two States differed, the commissioner of Virginia contending that by the act of the legislature, above referred to, that

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 35–6). [2] *Ibid.* (217 U.S. 1, 36).

State had not adopted the meridian line from the Fairfax Stone as the boundary. The commissioner of Maryland contended for that meridian line. On March 5, 1860, the legislature of Maryland passed an act adopting the Michler line, commencing at the Fairfax Stone at the head of the North Branch of the Potomac River, and running thence due north to the southern line of Pennsylvania, as surveyed in the year 1859 by commissioners appointed by the States of Maryland and Virginia, and thereafter the State of Maryland provided for the marking of the Michler line.

Virginia did not approve the Michler line, but in 1887 West Virginia passed an act confirming the line as run by Lieutenant Michler in 1859 as the true boundary line between West Virginia and Maryland, but the act was not to take effect until and unless Maryland should pass an act or acts confirming and rendering valid all the entries, grants, patents and titles from the Commonwealth of Virginia to any person, or persons, to lands situate and lying between the new Maryland line and the old Maryland line heretofore claimed by Virginia and West Virginia, to the same extent and with like legal effect as though the said old Maryland line was confirmed and established.[1]

Maryland did not accept the proposition of West Virginia ; hence, the present suit. Lieutenant Michler ascribes the divergence between his own line and that of Deakins to the fact that the latter was probably run ' with a surveyor's compass ' ; but, whether astronomically accurate or not, and whether adopted by Maryland or not, the inhabitants of the region regarded the Deakins line as the boundary between the States, and apparently no grants after that period were made west of that line by Maryland authorities. Thus Lieutenant Michler, in what the court is pleased to call ' the frank and able report filed with his survey ', said that the line of his predecessor was the one ' generally adopted by the inhabitants as the boundary line '.[2] And a report of the committee of the Maryland Historical Society, as quoted by Mr. Justice Day, reports that ' the provisional line of 1787, or " Deakins line ", as it was called, had long done duty as a boundary ; and as the State granted no lands beyond it, it came to be looked upon—despite the emphatic protest of the assembly of 1788, as the true boundary line of the State '.[3] And the report of the Historical Society states that the litigation referred to in the act of 1852, requesting the appointment of commissioners, was due to the fact that ' in process of time the marks became obliterated, and conflicts of title and litigation arose between the holders of Maryland and the holders of Virginia patents for lands in the debatable territory '.[4]

The Deakins line acted on by the inhabitants,

After referring to the fact that the State of Maryland had recognized the Deakins line in sundry grants, Mr. Justice Day thus sums up the opinion of the court regarding the nature and value of the Deakins line, laying, as will be observed, a foundation for confirmation thereof by occupation and acquiescence :

and recognized in Maryland grants.

But the evidence contained in this record leaves no room to doubt that after the running of the Deakins line the people of that region knew and referred to it as the line between the State of Virginia and the State of Maryland. . . .

This record leaves no doubt as to the truth of the statement contained in the report of the committee of the Maryland Historical Society, that the Deakins line, before the passage of the act under which the Michler line was run, had long been recognized as a boundary and served as such. Even after the Michler line was run and marked the testimony shows that the people generally adhered to the old line as the true boundary line. . . .

The testimony shows that the people living along the Deakins line worked and

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 37–8).
[2] *Ibid.* (217 U.S. 1, 38). [3] *Ibid.* (217 U.S. 1, 39). [4] *Ibid.* (217 U.S. 1, 39).

improved the roads on the Virginia side, as a general rule, up to this line. Correspondingly, Maryland worked the roads on the other side of this line. On the west of the line the people paid taxes on their lands in Preston County, Virginia. They voted in that county, and with rare exceptions regarded themselves as citizens of West Virginia. As a general rule, the schools established there were West Virginia schools. The allegiance of nearly all these people has been given to West Virginia.[1]

After referring, without recounting them, to the many interesting details to be found in the report of the committee of the Maryland Historical Society, Mr. Justice Day continues and thus concludes on this point :

And the fact remains that after the Deakins survey in 1788 the people living along the line generally regarded that line as the boundary line between the States at bar. In the acts of the legislatures of the two States, to which we have already referred, resulting in the survey and running of the Michler line, it is evident from the language used that the purpose was not to establish a new line, but to retrace the old one, and we are strongly inclined to believe that had this been done at that time the controversy would have been settled.

A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored.[2]

Mr. Justice Day does not, however, rely upon the facts as conclusive of themselves, but invokes the great authority of the court of which he was a member, quoting freely from the opinion of Mr. Justice Field in the case of *Virginia* v. *Tennessee* (148 U.S. 503, 522, 523), decided in 1893, and at lesser length from the opinion of Mr. Chief Justice Fuller in *Louisiana* v. *Mississippi* (202 U.S. 1, 53), decided in 1906. From the opinion in the first case, Mr. Justice Day quotes the following :

The argument from possession.

Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant ; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke in *Penn* v. *Lord Baltimore*, 1 Vesey Sen. 444, 448 ; *Boyd* v. *Graves*, 4 Wheat. 513 ; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 734 ; *United States* v. *Stone*, 2 Wall. 525, 537 ; *Kellogg* v. *Smith*, 7 Cush. [Mass.], 375, 382 ; *Chenery* v. *Waltham*, 8 Cush. [Mass.], 327 ; Hunt on Boundaries (3d ed.), 396.

As was inevitable, Mr. Justice Day could not resist quoting and making his own, as far as one can make his own the opinion of another, the passage in this case, which Mr. Justice Field himself could not refrain from quoting, from *Rhode Island* v. *Massachusetts* (4 Howard, 591, 639), decided in 1846, in which Mr. Justice McLean, speaking for a unanimous court, said :

No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than a case of disputed boundary.

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 38–41).
[2] *Ibid.* (217 U.S. 1, 41).

And Mr. Justice Day could not resist—who could?—transcribing a further passage from the opinion of Mr. Justice Field in the case of *Virginia* v. *Tennessee*, in which that learned Justice spoke of what the great Iron Chancellor would have called the imponderable things :

> There are also moral considerations which should prevent any disturbance of long recognized boundary lines ; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to the country, to home and to family, on which is based all that is dearest and most valuable in life.

And after these quotations, re-enforcing his own views, Mr. Justice Day said, in his own behalf and in behalf of the court which he had the honour to represent :

> An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations.[1]

And from the application of these principles, limited to the facts of each particular case, he thus announced the decree which the court was prepared to render in this phase of the controversy :

> True it is, that, after the running of the Deakins line, certain steps were taken, intended to provide a more effectual legal settlement and delimitation of the boundary. But none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line. . . .
>
> It may be true that an attempt to relocate the Deakins line will show that it is somewhat irregular, and not a uniform, astronomical north and south line ; but both surveyors appointed by the States represented in this controversy were able to locate a number of points along the line, and the northern limit thereof is fixed by a mound, and was located by the commissioners who fixed the boundary between West Virginia and Pennsylvania by a monument which was erected at that point, and we think from the evidence in this record that it can be located with little difficulty by competent commissioners.
>
> We think, for the reasons which we have undertaken to state, that the decree in this case should provide for the appointment of commissioners whose duty it shall be to run and permanently mark the old Deakins line, beginning at a point where the north and south line from the Fairfax Stone crosses the Potomac River and running thence northerly along said line to the Pennsylvania border.[2]

Deakins line approved by the Court.

The third point in the controversy between Maryland and Virginia was the ownership of the Potomac and the extent to which the State claiming ownership exercised jurisdiction to the opposite shore. The charter granted to Lord Baltimore expressly, it would seem, conveyed ownership of the Potomac, inasmuch as, after fixing the first fountain of that river as the western boundary of the colony, the boundary proceeded downward toward the south 'to the farther bank of the said river', and followed it to its mouth in the Chesapeake. In view of this language, it would seem that the only question was whether the jurisdiction of Maryland stopped with low or high-water mark on the opposite bank.

Question of the Potomac.

The question of ownership, as far as Maryland and Virginia were concerned, was

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 44).
[2] *Ibid.* (217 U.S. 1, 44–5).

not an open one. Reserving for the second phase of the case a further discussion of the matter, it is sufficient to state in this connexion that the title to the river was admitted by both States to be in Maryland, and that the extent of Maryland's claim to jurisdiction beyond the middle of the river, and upon what might be called the Virginia side, was submitted in 1877 to a commission of distinguished lawyers, which fixed the line and boundary at low-water mark on the Virginia shore. To this arbitration, however, West Virginia was not a party; it was not represented in the commission ; it was not bound by the award ; but the award of the commission was nevertheless very persuasive. Again, it is to be said that this question had been before and was settled by the Supreme Court in the case of *Morris* v. *United States* (174 U.S. 196), decided in 1899, in which Mr. Justice Shiras, delivering the opinion of the court, and after reciting the arbitration between the two States of 1877 and its award, said :

Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culepeper, never of right included the Potomac River, or as establishing a compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore, by Charles I in 1632, of the territory known as the province of Maryland, embraced the Potomac River and soil under it, and the islands therein, to high-water mark on the southern or Virginia shore ; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution ; nor was such grant affected by the subsequent grant to Lord Culpeper.

The whole river was granted to Maryland.

The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to property rights in the Potomac River, or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river to private persons. Her claim seems to have been that of political jurisdiction.

This decision seemed to settle the matter, inasmuch as, without taking into consideration the award as modifying the jurisdiction of the two States in the premises, the title to the river and to high-water mark on the southern shore was adjudged to be in Maryland, and therefore in direct conflict with the claim of West Virginia, in this respect Virginia's successor in title, as set forth in its cross bill.

Inasmuch as the three questions in controversy had thus been decided, Mr. Justice Day was able to dispose of the case, which he thus did on behalf of the court :

Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. If this decision can possibly have a tendency to disturb titles derived from one State or the other, by grants long acquiesced in, giving the force and right of prescription to the ownership in which they are held, it will no doubt be the pleasure as it will be the manifest duty of the lawmaking bodies of the two States to confirm such private rights upon principles of justice and right applicable to the situation.

Decree accordingly.

A decree should be entered settling the rights of the States to the western boundary, and fixing the same, as we have hereinbefore indicated, to be run and established along the old line known as the Deakins or old state line ; and commissioners should be appointed to locate and establish said line as near as may be. The

cross bill of the State of West Virginia should be dismissed in so far as it asks for a decree fixing the north bank of the Potomac River as her boundary. Counsel for the respective States are given forty days from the entry hereof to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the States.[1]

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By the decision of the Supreme Court in the first case of *Maryland* v. *West Virginia* (217 U.S. 1), decided in 1910, counsel for the stately litigants were given forty days ' to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners and itself draw the decree in conformity therewith '.

In compliance with this order, counsel appeared and submitted drafts and briefs on April 30, 1910, and the decree in accordance with the proceedings had in this phase of the case was settled the last day of the succeeding month.

Two differences had arisen. In the first place, counsel for West Virginia contended that the jurisdiction of Maryland should extend only to low-water mark on the southern side of the Potomac, whereas Maryland claimed to high-water mark ; and, in the second place, Maryland proposed that costs of the surveys should be borne in equal moities by the States, whereas West Virginia insisted that each State should bear its own expenses in this regard.

First. The reference of the decree to counsel was productive of good effects, for they bestirred themselves not only to draft a decree agreeable to their clients, but, by a careful examination of the disputes between Maryland and Virginia as to the jurisdiction of the former upon the shores of the latter, they laid before the court the evidence of the compromise of 1785, made by commissioners of the two States meeting at Mt. Vernon, and under the presidency, as would be supposed, of George Washington, then living in retirement, but always the first citizen of the country whose independence he had made. In virtue of the Mt. Vernon compact of March 28, 1785, confirmed thereafter by Maryland and by the general assembly of Virginia on January 3, 1786, West Virginia would be entitled to claim the benefit, as it would have been obliged to submit to a detriment, as it was then an integral part of Virginia, and bound by all acts of that State lawfully done until the date of separation on June 30, 1863.

Question of the high- or low-water mark line.

After stating that the attention of the court, in the previous case of *Maryland* v. *West Virginia*, had not been directed to the question ' whether the boundary of Maryland should be at high-water mark or at low-water mark along the southern bank of the Potomac River ', and after summarizing the judgement of the Supreme Court in *Morris* v. *United States* (174 U.S. 196), decided in 1899, holding that Lord Culpeper and his successor, Lord Fairfax, did not take title to the Potomac River, and that the jurisdiction of Maryland extended to high-water mark, Mr. Justice Day

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 1, 46–7).

devoted himself particularly to the arbitration of 1877 between Virginia and Maryland, saying :

But the arbitrators proceeding to establish the boundary between the States in the light of subsequent events, after referring to the effect of long occupation upon the rights of States and nations, and declaring that the length of time that raises a right by prescription in private parties likewise raises such a presumption in favor of States as well as private parties, took up the location of the boundary between the States along the Potomac River, and said :

' The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland ; but on the contrary, she expressly reserved " the property of the Virginia shores or strands bordering on either of said rivers, (Potomac or Pokomoke) and all improvements which have or will be made thereon ". By the compact of 1785, Maryland assented to this, and declared that "the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements ".' . . .

The compact of 1785.

' Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water mark, and appurtenances thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

' To that extent Virginia has shown her rights on the river so clearly as to make them indisputable.' [1]

Because of this compact, framed by commissioners appointed by the two States, and approved thereafter by the legislatures of Maryland and of Virginia, the court held that West Virginia was entitled to the benefit of the compact, although it would not have been entitled to the benefit of the arbitration of 1877, to which it was not a party, and thus announced its final decision in the matter of title to the Potomac River and its shores :

Acquiescence of Maryland in the low-water mark line.

The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, § 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the compact of 1785 and its subsequent ratifications indicate the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia at low-water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the States respectively.

Decree in favour of West Virginia.

The decree will therefore provide for the south bank of the Potomac River at low-water mark on the West Virginia shore as the true southern boundary line of the State of Maryland.[2]

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 577, 580).
[2] *Ibid.* (217 U.S. 577, 580–1).

Costs of the survey to be shared equally.

SECOND. The decision of the court as to the costs of survey should have been forecast by counsel, as, in a matter of equal interest to both, costs should be divided. This was the decision of the court, and this simple statement would suffice. But Mr. Justice Day was not content with a brief and curt statement, as a dispute between States, however trifling it may seem, is nevertheless a matter of importance, deserving and receiving the most careful consideration of the court. Thus, Mr. Justice Day said on behalf of his brethren :

An examination of the record shows that early in the proceedings in this case, on the twenty-sixth day of May, 1894, an order was entered by consent of parties, which authorized a survey to be made by surveyors to be agreed upon in writing by counsel for the respective States, said surveyor or surveyors to return to this court a report and map or maps made by him or them under the order, together with copies of such report, map or maps. The order provided for notice to be given attorneys for both parties of the time and place of commencing such surveys. Subsequently surveyors were designated, surveys were made and elaborate reports were filed in this court. Under these circumstances we are of opinion that the order heretofore made concerning the division of the costs should include the costs of such surveys. As was said by this court in *Nebraska* v. *Iowa*, 143 U.S. 359, 370, in making an order for a division of costs between the two States in a boundary dispute, the matter involved is governmental in character, in which each party has a real and yet not a litigious interest. The object to be obtained is the settlement of a boundary line between sovereign States in the interest, not only of property rights, but also in promotion of the peace and good order of the communities, and is one which the States have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, and we therefore adopt so much of the decree proposed by the State of Maryland as makes provision for the costs of the surveys made under the order of this court.[1]

In view of the fullness with which the proceedings of the court have been summarized in the boundary dispute between Maryland and West Virginia, it will not be necessary to reproduce the decree in its entirety, but only, in this connexion, to quote that portion of it laying down the principles to be followed by the three commissioners appointed to draw and to mark the western boundary between the States, and, as in other cases, to report their proceedings to the court for its approval :

Form of the decree.

First. That the true boundary line between the States of Maryland and West Virginia is ascertained and established as follows :

Beginning at the common corner of the States of Maryland and Virginia on the southern bank of the Potomac River at low-water mark at or near the mouth of the Shenandoah River (near Harper's Ferry,) and running thence with the southern bank of the said Potomac River, at low-water mark, and with the southern bank of the North Branch of the Potomac River at low-water mark, to the point where the north and south line from the Fairfax Stone crosses the said North Branch of the Potomac, and thence running northerly, as near as may be, with the Deakins or Old State line to the line of the State of Pennsylvania. . . .

Fourth. That this decree shall not be construed as abrogating or setting aside the compact made between commissioners of the State of Maryland and the State of Virginia at Mount Vernon on the 28th day of March, 1785, and which was confirmed by the general assembly of Maryland and afterwards by act of the general assembly of Virginia passed on the 3rd day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 577, 581–2).

United States, or may be inconsistent with this decree, shall remain obligatory upon and between the States of Maryland and West Virginia, so far as it is applicable to that part of the Potomac River which extends along the border of said States, as ascertained and established by this decree.[1]

The Mt. Vernon compact was more than a settlement of the dispute between Maryland and Virginia. It carried within it the germ of greater things. It led to the welcome spectacle of two States agreeing upon the freedom of navigation of the Potomac. It suggested the possibility of an agreement of other States upon questions of commerce, which itself resulted in the meeting of commissioners in Annapolis in 1786, and the recommendation of that body for a convention to be held in Philadelphia the succeeding year for the revision of the Articles of Confederation. This fortunately happened, and resulted in the Constitution of the United States and the creation of the first international court in successful operation which this world has ever known.[2]

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Master's report presented (*vide* p. 460, *ante*).

The third phase of the money dispute between Virginia and West Virginia (220 U.S. 1), decided in 1911, turned upon the report of the master, Charles E. Littlefield, appointed June 1, 1908, under decree of the court in the second phase of the case of *Virginia* v. *West Virginia* (209 U.S. 514), decided in 1908, prepared in accordance with the decree in that case and likewise in accordance with the decree laid before the Supreme Court for the consideration of court and counsel. As the bill in this case was one for an accounting and as the report bristles with details and figures, as was natural and could not be avoided, it does not seem advisable or indeed desirable to attempt to follow the master through the wilderness of detail lest we fail to see the forest for the trees, but to follow Mr. Justice Holmes in the opinion which he delivered for a unanimous court. This is not without detail and figures but it lays down in masterly fashion the principles which should be applied in an international accounting, as in this case, where there were no principles of municipal law and where the principles of right and justice and equity between States, unencumbered by technicalities, obtain or should obtain in adjusting the share of indebtedness which a state or nation, separating itself from the parent, should assume of the indebtedness contracted before each went its separate ways.

Judgement of the Court.

The untechnical character of suits between States has been repeatedly pointed out in the course of this narrative, and, although many times stated in the reports, it has never been more happily or more aptly phrased than in the following passage by Mr. Justice Holmes, with a clearness and conciseness for which his opinions, often instinctive with literary charms, are noted :

Technicalities to be disregarded.

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State

[1] *State of Maryland* v. *State of West Virginia* (217 U.S. 577, 582, 585).

[2] See McLaughlin's *Confederation and the Constitution*, 1905, pp. 179 et seq ; Sharpe's *History of Maryland*, vol. ii, pp. 528 et seq.

alone. *Missouri* v. *Illinois*, 200 U.S. 496, 519, 520. *Kansas* v. *Colorado*, 206 U.S. 46, 82–84. Therefore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits, with which we proceed to deal. See *Rhode Island* v. *Massachusetts*, 14 Peters, 210, 257. *United States* v. *Beebe*, 127 U.S. 338.[1]

A fundamental question in this case was and is, because it is still pending, the nature of the obligation by virtue whereof West Virginia should assume and satisfy a just and equitable proportion of the debt contracted by the State of Virginia during such time as the counties included in the new State of West Virginia formed an integral part thereof. It is not necessary to resort to the law of nations in this matter, although international law may be invoked to re-enforce the conclusion otherwise reached. The inhabitants of the western counties, unwilling to follow their fellow citizens of the counties of the east in seceding from the Union, organized themselves as the Government of Virginia and were recognized by the Congress as the Reorganized Government of that great and historical State. This government recognized that the new State to be formed of the western counties should assume a portion of the debt contracted by the parent State in which the counties of West Virginia were then included and so stated in the so-called Wheeling ordinance. The Constitution of the new State as framed recognized this as a duty. The consent of Virginia to the admission of West Virginia as a State of the Union (meaning by Virginia in this connexion the reorganized State, for at that time the people of the eastern counties were confessing their faith on the field of battle elsewhere, and were not and could not be consulted as to the dismemberment of the Commonwealth), was given by act of its legislature passed May 13, 1862, 'under the provisions set forth in the Constitution for the said State of West Virginia', including the statement of the obligation to assume and satisfy an equitable portion of the indebtedness before January 1, 1861. The decision of the Supreme Court in the boundary dispute between the two States, *Virginia* v. *West Virginia* (11 Wallace, 39), decided in 1870, held that the provisions of the Constitution of West Virginia, consented to by the Restored State of Virginia, constituted a contract and was therefore binding upon the old and the new States.

The 9th section of the Wheeling ordinance, material to the present purpose, is thus worded :

> The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted ; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the said period.[2]

In pursuance of this direction, the eighth section of article 8 of the Constitution of the State provided that :

> An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State ; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years.[3]

Constitution of West Virginia, Art. 8.

[1] *State of Virginia* v. *State of West Virginia* (220 U.S. 1, 27).
[2] *Ibid.* (220 U.S. 1, 25).
[3] *Ibid.* (220 U.S. 1, 26).

Counsel for West Virginia insisted that the master should take into account the provisions of the ordinance regarded by them as more favourable to the contentions of their client. Where they agreed with the provisions of the Constitution of West Virginia it was unnecessary to do so ; where they differed, it could not be done, in that a formal contract is universally held to include within its terms those portions of the preliminary negotiations which the parties cared to preserve and to reject those portions inconsistent with the final terms of such a contract. As Mr. Justice Holmes puts it :

West Virginia is bound by contract.

> the consent of the legislature of the restored State was a consent to the admission of West Virginia under the provisions set forth in the constitution for the would-be State, and Congress gave its sanction only on the footing of the same constitution and the consent of Virginia in the last-mentioned act. These three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.[1]

The court therefore, and necessarily it would seem, eliminated the so-called Wheeling ordinance from consideration, leaving the nature and extent of the obligation to be determined by the provisions of the constitution of West Virginia to be construed as a contract between the United States and the contracting States. In the course of his opinion Mr. Justice Holmes takes up and considers, only to reject, certain contentions of counsel for West Virginia. The first of these was that the debt of Virginia was incurred for local improvements, and that it should therefore be divided according to the territory in which the money was expended. To this the learned Justice replied :

The debt cannot be calculated according to local improvements.

> We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that two or three-fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one-fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole State would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand. If we should attempt to look farther, many of the corporations concerned were engaged in improvements that had West Virginia for their objective point, and we should be lost in futile detail if we should try to unravel in each instance the ultimate scope of the scheme. It would be unjust, however, to stop with the place where the first steps were taken and not to consider the purpose with which the enterprise was begun. All the expenditures had the ultimate good of the whole State in view.[2]

Again, it was argued by counsel for West Virginia, on the assumption that the provision of its Constitution created a contract by which it was bound, that the equitable proportion of the indebtedness was to be determined by the legislature, not by the parties to the contract, much less by the court, inasmuch as the legislature

[1] *State of Virginia* v. *State of West Virginia* (220 U.S. 1, 28). [2] *Ibid.* (220 U.S. 1, 29–30).

of that State was the agency designated for this purpose and could not be changed without the consent of the parties to the agreement, of which West Virginia was one. To this contention Mr. Justice Holmes briefly and pointedly replied :

These arguments do not impress us. The provision in the constitution of the State of West Virginia that the legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be and an indication of the way. Apart from the language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in nowise beyond the competence of a tribunal to decide.[1]

While the contract is thus to be the measure if not the origin of the liability of the State of West Virginia, it is of interest to show the accordance between the contract and international law, which is fortunately at hand in the case of *Hartman* v. *Greenhow* (102 U.S. 672, 677–8); decided in 1880, to which Mr. Justice Holmes refers, but from which he does not quote. In delivering the opinion of the court in that case, dealing with bonds issued by the State of Virginia in 1871, to extinguish two-thirds of this very indebtedness, and taxing West Virginia with the payment of a third thereof, Mr. Justice Field said :

During the war a portion of her territory was separated from her, and by its people a new State, named West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But as the whole State had created the indebtedness for which the bonds were issued, and participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new State. Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject Kent says : ' If a State should be divided in respect to territory, its rights and obligations are not impaired ; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common.' 1 Com. 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice of nations.' International Law, c. 3, sect. 27.

The rule of international law.

Mr. Justice Field then goes on to say that :

In conformity with the doctrine thus stated by Halleck, both States—Virginia and West Virginia—have recognized in their Constitutions their respective liability for an equitable proportion of the old debt of the State, and have provided that measures should be taken for its settlement. The Constitution of Virginia of 1870 declared that the General Assembly should ' provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia ', and should ' provide that such sums as shall be received from West Virginia shall be applied to the payment of the public debt of the State '. Art. 10, sect. 19.

State of Virginia v. *State of West Virginia* (220 U.S. 1, 30–1).

With the provisions of the Constitution of West Virginia, which Mr. Justice Field here quotes, the reader is familiar, and they need not be again set forth. Thereafter, the learned Justice continues, showing the reason which prompted Virginia, and the first measure taken to extinguish this very indebtedness. Thus :

Financial measures taken by Virginia, 1871–92.

But notwithstanding these constitutional requirements and various efforts made to adjust the liabilities of West Virginia, nothing was accomplished up to March 30, 1871, and it is stated by counsel that nothing has been accomplished since. As might have been expected, the position of Virginia was not a pleasant one, being charged with the whole indebtedness which accrued before the formation out of her territory of a new State, and entitled to, without being able to obtain, a contribution from the new State of a part of it, corresponding proportionately to her extent and population. She, therefore, undertook to effect a separate adjustment with her creditors, and for that purpose, on the 30th of March, 1871, passed an act known as the 'Funding Act' of the State.

After setting forth the constitutional obligation of West Virginia, and assuming it at approximately one-third, the act provided for the issue of bonds bearing interest at the rate of six per cent. for two-thirds of this indebtedness, to be issued to the bond-holders thereof ; and for one-third of the indebtedness certificates, as distinct from bonds, were issued, stating that West Virginia was responsible for it, and that Virginia held in trust the bonds of this indebtedness for the benefit of the holders, to be satisfied when an arrangement had been had with West Virginia. These bonds were for the debt and interest accrued to July 1, 1871, and the new bonds, bearing the same rate of interest, receivable for all taxes and demands due, were issued to the amount of $12,703,451.79.

A second refunding act was passed May 28, 1879, authorizing the issue of bonds at a reduced interest, providing that the acceptance of the certificates for West Virginia's share should release Virginia from liability on this account, and that Virginia would negotiate or aid in negotiating for a settlement of West Virginia's indebtedness. Few, however, of these certificates were accepted. On February 14, 1882, a third statute was passed to effectuate the same purpose, inasmuch as the burden was felt to be very great upon Virginia at a time when it was only slowly recovering from the effects of the Civil War. The certificates for balances, not represented by bonds, stated that the balance was ' to be accounted for by the State of West Virginia without recourse upon this Commonwealth '. This issue, however, appears to have been without success. Finally, the act of February 20, 1892, was passed, which seems to have effected a final settlement. It appears that there were twenty-eight million dollars of debt outstanding and which had not been funded, and the act provided for the issue of bonds for $19,000,000 in exchange for the $28,000,000 outstanding, that the new bonds should bear interest at 2 per cent. for the first ten years and 3 per cent. for ninety years, and certificates, similar in form to those issued under the act of 1882, for the third of West Virginia's indebtedness. On March 6, 1894, a joint resolution of the Virginia legislature was passed which, after reciting the provisions of the above acts and the satisfactory adjustment of two-thirds of the outstanding indebtedness, appointed a committee to negotiate with West Virginia, provided a majority of the certificate-holders desired such negotiation, and would accept the amount to be paid by West Virginia in full settlement of the third of the indebtedness which the State of Virginia had not

assumed, without expense to the State. And on March 6, 1900, an act of the State of Virginia was passed, authorizing the commission to receive and to take on deposit the certificates, on condition that the holders thereof would accept the amount realized from West Virginia in full settlement of all their claims thereunder. Under this act, as under the joint resolution, the State of Virginia was not to be subjected to expense.

From the report of the commission dated January 9, 1906, it appeared that, leaving out of question certificates held by the State, and therefore not entering into the report, the commission held certificates for $10,851,294.09, issued under the act of 1871 previously referred to, and $2,322,141.32 of other certificates issued in the amount of $2,778,239.80. It is to be noted that, in all these transactions on the part of Virginia, that State only assumed two-thirds of the indebtedness contracted before January 1, 1861, and that the acceptance of the bonds for Virginia's share freed that State from liability for the unpaid third of West Virginia's indebtedness, evidenced by the certificates issued in accordance with the various refunding acts.[1]

Objection that Virginia had no longer a real interest.

On this state of affairs counsel for West Virginia opposed what might be considered as a third objection, that, inasmuch as Virginia had thus freed itself from liability for the third of the indebtedness in question, the State of Virginia could not prosecute a suit in the Supreme Court because it had no interest in the subject matter, and that, appearing for the certificate-holders as trustee, it brought itself within the rule laid down by the court in *New Hampshire* v. *Louisiana* (108 U.S. 76), decided in 1883, which negatived the claim of a State to appear in behalf of the interests of its citizens instead of in its own right as such. For the purposes of the decision, Mr. Justice Holmes, admitting this contention, which, however, he considered to be unsound, stated sound law, sound sense, and sound morality when he said :

The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two States. If one-third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining two-thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire* v. *Louisiana* into play. For even if Virginia is not liable she has the contract of West Virginia to bear an equitable share of the whole debt, a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See *United States* v. *Beebe*, 127 U.S. 338, 342. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U.S. 120, 125, 126. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his *cestui que trust*. *Lloyd's* v. *Harper*, 16 Ch. D. 290, 309, 315. *Lamb* v. *Vice*, 6 M. & W. 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.[2]

Objection overruled.

[1] *State of Virginia* v. *State of West Virginia* (220 U.S. 1, 31–3). [2] *Ibid.* (220 U.S. 1, 33–4).

Acting upon the principle which he professed, the learned Justice therefore continued:

Principles of valuation laid down.

It remains true then, notwithstanding all the transactions between the old Commonwealth and her bondholders, that West Virginia must bear her equitable proportion of the whole debt. With a qualification which we shall mention in a moment, we are of opinion that the nearest approach to justice that we can make is to adopt a ratio determined by the master's estimated value of the real and personal property of the two States on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger share on West Virginia, but the relative resources of the debtor populations are generally recognized, we think, as affording a proper measure. It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia $300,887,367.74, and for West Virginia $92,416,021.65. These figures are criticised by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia cannot complain of the result. They would give the proportion in which the $33,897,073.82 [found by the master to be the sum represented mainly by interest bearing coupons] was to be divided, but for a correction which Virginia has made necessary. Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt, whereas at the ratio shown by the figures her share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the creditors were content to accept from her, say $22,598,049.21, is $3,333,212.26; subtracting the last sum from the debt leaves $30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have $7,182,507.46 as her share of the principal debt.[1]

The learned Justice stated these figures subject to correction, as they necessarily would be submitted to the master for his guidance and revision if necessary in his final report. It will be observed that the valuation of slaves was omitted, although by the law of Virginia in force on January 1, 1861, slaves were property. The question, however, was political, it was not financial, and it is difficult to see how, after the Civil War and in view of all the circumstances, this item could have been allowed.

It may be observed that the question of interest was untouched upon in the opinion, but the learned Justice did not overlook it, and referred to it in the closing paragraph as one for subsequent consideration, although he ventured to express an opinion against allowance of interest, which, however, was not followed in the final disposition of the case, which very properly included interest. Thus, he said:

Question of interest postponed.

Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on the other. The circumstances of the asserted default and the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar.[2]

[1] *State of Virginia* v. *State of West Virginia* (220 U.S. 1, 34–5). [2] *Ibid.* (220 U.S. 1, 35–6).

Appeal of the Court for a friendly settlement.

And Mr. Justice Holmes terminates his opinion, which might without impropriety be termed a model in view of all the circumstances, with a passage in which literature, native sense of propriety, and wide experience with the affairs of life are happily joined, and in equal proportions :

As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.[1]

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The third phase of the controversy between Virginia and West Virginia, decided on March 6, 1911, laid down the principle upon which the final decree was to be based, and the State of Virginia, which had been annoyed and perplexed by the case for almost half a century, was anxious that it should be disposed of in accordance with the principle laid down, and he got out of the way.

Virginia moves for a speedy decision.

It therefore submitted a motion on October 10, 1911, to proceed with the further hearing and determination of the cause. The motion was overruled within the month, to be explicit, on the 30th day thereof, in an opinion rendered by Mr. Justice Holmes, holding, what we all know by experience, that States move slowly, much slower than private parties. The cause of the motion was due to the suggestion contained in the opinion of Mr. Justice Holmes himself in the preceding case, that a conference be held between the parties. In order to bring this about, the Virginia Debt Commission wrote to the Governor of West Virginia on April 20, 1911, requesting him to take steps for a conference at an early date. It appeared that the Legislature of West Virginia was called for special session, that under the laws of that State it could only consider the business mentioned in the call convening it, but as twenty-six days intervened between the call and the date set for the meeting, there was, therefore, time for the Governor to issue a further proclamation on the subject of the debt, had he so desired. Apparently he did not care to do so, but in his message to the Legislature he referred to the debt, and asked whether the appointment of the Virginia Debt Commission was enough to require West Virginia 'to take the initiative', and whether a Commission of the State of West Virginia should be appointed to meet the Virginia Commission. He also stated that if a majority of the Legislature should share this opinion, he would call a special session of the Legislature for its consideration. Whether the Legislature was not anxious, or both were unwilling to take up the matter of the debt, the call was not issued, and the Legislature was left to meet at its regular session in January 1913.

Unsuccessful attempt of Virginia to arrange a conference.

[1] *State of Virginia* v. *State of West Virginia* (220 U.S. 1, 36).

Under these circumstances the State of Virginia believed that a conference was not likely to take place with satisfactory results, inasmuch as it wanted a Commission formally constituted and with powers corresponding to the importance of the subject to be considered. The counsel for West Virginia opposed the motion, stating that the Governor doubted his right to amend the proclamation ; that no body in West Virginia except the Legislature had the power to deal with the question ; that the Virginia Debt Commission lacked authority inasmuch as it could only negotiate upon the basis of Virginia's liability for two-thirds of the indebtedness, and that in any event the court should not act before the Legislature of West Virginia could convene in regular session and consider the case in the spirit anticipated by the court.

Mr. Justice Holmes was not more impressed with the objections of counsel for West Virginia in this phase than he had been by the objections raised in previous phase of the case.

But, he said, a State cannot be expected to move with the celerity of a private business man ; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed.[1]

Language such as this clearly implies a belief on the part of the learned Justice and of the Court, whose unanimous opinion he delivered, that the objection was interposed for delay, as the co-operation of the Legislature did not seem necessary for a conference of this kind. Indeed he stated, 'A question like the present should be disposed of without undue delay'. He recognized the fact, only too patent to lawyer and laymen alike, that States often keep pace with the glacier, and, accepting the opinion of the counsel for West Virginia as correct, as he was perhaps obliged to do, he concluded on behalf of the Court :

Motion denied. Action of the legislature to be awaited.

that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace.[2]

71. State of Maryland v. State of West Virginia.

(225 U.S. 1) 1912.

The long-drawn-out controversy between the State of Maryland and the State of West Virginia was decided in principle in *Maryland* v. *West Virginia* (217 U.S. 577).

The decree of the Court, according to that principle, was settled in *Maryland* v. *West Virginia* (217 U.S. 577), and in the case under consideration, *Maryland* v. *West Virginia* (225 U.S. 1), decided on May 27, 1912, the report was confirmed in all respects, of the Commissioners appointed

to run, locate, and establish and permanently mark with suitable monuments, the said Deakins, or 'Old State Line', as the boundary line between the States of Maryland and West Virginia, from said point, [low-water mark], on the southern bank of the northern branch of the Potomac River, to the said Pennsylvania line, . . .

[1] *State of Virginia* v. *State of West Virginia* (220 U.S. 1, 19–20).

[2] *Ibid.* (220 U.S. 1, 20). For the succeeding phase of this case see *State of Virginia* v. *State of West Virginia* (231 U.S. 89), *post*, p. 495.

Majority and minority reports presented.

The Commissioner appointed from Maryland differed from his two colleagues in certain matters, and transmitted a separate report, so that the Court had before it a majority and a minority report. Counsel for Maryland sustained the exceptions made by the Maryland Commissioner, to the majority report. Counsel for West Virginia moved, however, the acceptance of the majority report, and after carefully considering the matter, the Court overruled the exceptions of the Maryland Commissioner, confirmed the report of the majority, and entered the following decree, which, fortunately, ended the controversy between the two States of Maryland and West Virginia :

Decree confirming the majority report.

It is further adjudged, ordered and decreed that the line as delineated and set forth in said report of Commissioners Monroe and Gannett, and upon the map accompanying the same and referred to therein, which line has been marked with permanent monuments, as stated in said report, be, and the same is hereby, established, declared, and decreed to be the true boundary line between the said States of Maryland and West Virginia, and said map is hereby directed to be filed as part of this decree.

Costs to be shared equally.

And it appearing that the total expenses and compensation of said Commissioners and the expenditures attending upon the discharge of their duties amount to the sum of $17,154.60, it is further adjudged, ordered and decreed that the same be, and they are, hereby approved and allowed as part of the costs of this suit, to be borne equally between the parties to this cause. And it appearing from said report that the State of Maryland has already paid $5,038.40 of said amount, and that the State of West Virginia has already paid $12,116.11 of said amount, it is ordered that said amounts be credited to said States respectively in the settlement of the costs of this suit between them in accordance with the provisions of this decree and the former decrees entered herein.

It is further adjudged, ordered and decreed that the clerk of this court do transmit to the chief magistrates of the States of Maryland and West Virginia copies of this decree, duly authenticated under the seal of this court. . . .[1]

72. State of Virginia v. State of West Virginia.

(231 U.S. 89) 1913.

But the State of Virginia insisted after, as well as before, the overruling of its motion that the Court should take up the controversy, and decide it according to the principles of decision announced by that tribunal.

Two years and more had passed, and the Legislature of West Virginia had met in regular session, a Commission representing West Virginia had been appointed, but the course of proceeding convinced Virginia that the Commissioners would not reach a satisfactory conclusion. Therefore, on October 14, 1913, it renewed in effect the motion overruled two years previously, that the Court decide the controversy. Again counsel for West Virginia interposed objection. Mr. Chief Justice White, on behalf of a unanimous Court, said :

Virginia again moves for a decision.

West Virginia asks for six months more time.

But without reviewing the course of negotiations relied upon, we think it suffices to say that in resisting the motion the Attorney General of West Virginia on behalf of that State insists that the view taken by Virginia of the negotiations is a misapprehension of the purposes of West Virginia, as that State since the appointment of the Commission on its behalf has been relying upon that Commission, ' to consummate

State of Maryland v. *State of West Virginia* (225 U.S. 1, 31).

such an adjustment and settlement of said controversy as to commend the result of its negotiations to the favorable consideration of the Governor and the Legislative branch of its government, and thus terminate said controversy to the satisfaction of her people and the Commonwealth of Virginia, and upon the principles of honor and justice to both States, and in fairness to the holders of the debt for whose benefit this controversy is still pending'. The Attorney General further stating that in order to accomplish the results just mentioned, a sub-committee of the Commission of West Virginia has been and is engaged in investigating the whole subject with the purpose of preparing a proposition to be submitted to the Virginia Debt Commission, to finally settle the whole matter, and that a period of six months time is necessary to enable the Committee to complete its labors.[1]

The Court could not well refuse a request of this kind coming from the duly qualified representative of a State of the Union, but as a grant of six months' delay might carry the case over to next term and result in an extension of more than a year, the Court assigned the 13th day of April next for a final hearing, saying, per Mr. Chief Justice White, on November 10, 1913:

The Court grants a delay of five months.

Having regard to these representatives, we think we ought not to grant the motion to proceed at once to consider and determine the cause, but should, as near as we can do so consistently with justice, comply with the request made for further time to enable the Commissioners of West Virginia to complete the work which we are assured they are now engaged in performing for the purpose of effecting a settlement of the controversy. As, however, the granting of a six months' delay would necessitate carrying the case possibly over to the next term and therefore be in all probability an extension of time of more than a year, we shall reduce somewhat the time asked and direct that the case be assigned for final hearing on the 13th day of April next at the head of the call for that day.[2]

73. State of Virginia v. State of West Virginia.

(234 U.S. 117) 1914.

West Virginia asks leave to file a supplemental answer.

At the time set for the hearing of the controversy between Virginia and West Virginia, April 13, 1913, the counsel for West Virginia appeared and, in accordance with a motion filed some days previously, asked permission to file a supplemental answer setting up credits which, if allowed, would materially reduce the sum due to Virginia and asserting various reasons why interest should not be allowed to Virginia upon the West Virginia share of the indebtedness. Counsel for Virginia resisted this motion, insisting that the items embraced in the supplemental answer had in effect been considered in determining the amount of the principal sum due and payable by West Virginia, and that if not, the case should not now be postponed in order to enable West Virginia to avail itself of rights urged in the answer, because as stated in the summary of Virginia's objections, prepared by Mr. Chief Justice White on behalf of the Court:

Every item concerning such alleged rights was proved in the case before the Master, was mentioned in his report, and was known or could have been known by the use of ordinary intelligence by those representing West Virginia.[3]

The question confronting the Court in this phase of the case was whether a further postponement should be granted at the request of West Virginia for the reasons advanced by its counsel. On this point, without expressing an opinion as

[1] *State of Virginia* v. *State of West Virginia* (231 U.S. 89, 90–1).
[2] *Ibid.* (231 U.S. 89, 91).
[3] *Ibid.* (234 U.S. 117, 120).

to the merits of the motion, although stating 'that most of the items embraced in the answer were contained in the Master's report,' Mr. Chief Justice White stated on behalf of a unanimous Court :

Relaxation of strict rules of procedure where States are parties.

We think it must be conceded that in a case between ordinary litigants the application of the ordinary rules of legal procedure would render it impossible under the circumstances we have stated to grant the request. We are of the opinion, however, that such concession should not be here controlling. As we have pointed out, in acting in this case from the first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States involving grave questions of public law determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been a guide by which every step and conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving State, also in our opinion operates no injustice to the opposing State, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.[1]

The Chief Justice, therefore, on behalf of the Court, and because of these convictions announced the following order :

Leave granted.

That the motion on the part of the State of West Virginia to file the supplemental answer be and the same is hereby granted ; and that the averments in such answer be and the same shall be considered as traversed by the State of Virginia ; that the subject matter of the supplemental answer as traversed be at once referred for consideration and report to Charles E. Littlefield, Esq., the Master before whom the previous hearings were had, with directions to hear and consider such evidence and testimony as to the matters set forth in the supplemental answer as the State of West Virginia may deem advisable to proffer and such counter showing on the part of the State of Virginia as that State may deem advisable to make. The report on the subject to embrace the testimony so taken and the conclusions deduced therefrom as well as the views of the Master concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous decree of this court. Nothing in this order to vacate or change in any manner or in any particular the previous decree, and the same to stand wholly unaffected by the order now made or any action taken thereunder until the examination and report herein provided for is made and this Court acts upon the same. It is further directed that the proceedings before the Master be so conducted as to secure a report on or before the second Monday of October, 1914.[2]

State of North Carolina v. State of Tennessee.

(235 U.S. 1) 1914.

A boundary dispute

The controversy between North Carolina and Tennessee (235 U.S. 1), decided in 1914, concerns the boundary of the States and runs back to the early days of the

[1] *State of Virginia* v. *State of West Virginia* (234 U.S. 117, 121).

[2] *Ibid.* (234 U.S. 117, 122). For the succeeding phase of this case see *State of Virginia* v. *State of West Virginia* (238 U.S. 202), *post*, p. 503.

Republic—indeed, to the very year in which the Constitution of the United States went into effect—and involves but a part of the line between the two States, called respectively the Slick Rock and Tellico basins or territories. In 1789 the territory now composing the State of Tennessee was ceded by North Carolina to the United States, and in the act of cession the boundary line westwardly from the French Broad River was described as follows :

Line defined by the cession of 1789.

Thence along the highest ridge of the said mountain [Iron Mountain] to the place where it is called Great Iron Mountain or Smoky Mountain ; thence along the extreme height of said mountain to the place where it is called Inicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota ; thence along the main ridge of such mountain to the southern boundary of this State.[1]

In pursuance of this act of cession, a deed was made by North Carolina in 1790 following the same description, likewise followed by Act of Congress accepting the cession and also incorporated in the Constitution of the State of Tennessee. The States were large, the settlers few, and, naturally, the geography of the region not well known. Therefore, in 1796, North Carolina passed an act appointing commissioners to settle the boundary line between it and Tennessee, and the latter State appointed commissioners for a like purpose. ' In pursuance of the authority,' to quote the exact language of the court, ' the commissioners appointed by the States settled the line from the east to a point on the Great Iron or Smoky Mountain west of the Pigeon River, marked by a stone set up on the north side of the Cataloochee Turnpike Road, about due north from the present town of Waynesville, in Heywood county, North Carolina, and about six miles east of the point where the Tennessee River passes through the mountain range, leaving the line to the southern boundary of the States unmarked.' [2]

Line drawn by commissioners, 1796.

Joint commission appointed, 1820, with power to bind both States.

' Subsequently,' to continue quoting from the opinion of Mr. Justice McKenna for a unanimous court, ' each of the States (North Carolina in 1819, Tennessee in 1820) passed acts appointing commissioners, to meet with commissioners appointed by the other, " and with them to settle, run and mark the boundary line between " the States " agreeable to the true intent and meaning " of the cession act. In the act of North Carolina it was provided that " this State will at all times hereafter ratify and confirm all and whatsoever the said commissioners, or the majority of those of each State, shall do, in and touching the premises, and the same shall be binding on this State " ; and Tennessee enacted " that whatsoever the said commissioners or those appointed by each State shall do in and touching the premises shall be binding on this State ".' [3]

Line ratified by both States, 1821.

Three commissioners were appointed by each State to settle, run and mark (' remark ' is the statement of the Tennessee act) the boundary line between the States. In accordance with these instructions and the authority vested in them they met, ran and marked the boundary line, reported their action to the respective States, and each State ratified the line located by the commissioners. North Carolina ' fully established, ratified, and confirmed ' it ' as the boundary line between the States of North Carolina and Tennessee forever '. Tennessee ' ratified, confirmed and established ' it ' as the true boundary line between this State and the State of

[1] *State of North Carolina* v. *State of Tennessee* (235 U.S. 1, 6).
[2] *Ibid.* (235 U.S. 1, 6). [3] *Ibid.* (235 U.S. 1, 6–7).

North Carolina '.[1] The report of the commissioners gives the beginning and end of the line and the intermediate courses and objects, and thus concludes :

The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore-and-aft tree, and three chops on each side line tree ; and mile-marked at the end of each mile ; agreeably to the plats which accompany this report ; and which said plats and reports are certified by us in duplicate, one for each of said States, in the same words, marks and figures ; which we respectfully submit to the Governors of the said States of Tennessee and North Carolina.[2]

Upon this state of affairs Mr. Justice McKenna asks the very pertinent question, which he himself answers. Thus :

The immediate question, therefore, is, Where was the line run ? And the answer would necessarily seem to be determined by the monuments, courses and distances, and, if these in any way conflict, by the line as marked by the commissioners if it can be ascertained, and the plats which accompanied the report certified in duplicate.[3]

There appears to have been no dispute as to the exact location of the line laid down by the commissioners. The contention of North Carolina seemed to be supported by the report of the commissioners, and tradition, as the court pointed out, sustained it by preponderating testimony. In 1836 it appears to have been recognized by the legislature of Tennessee, whose Surveyor-General, surveying and platting lands, made Slick Rock Creek the eastern boundary of the district. North Carolina, in turn, surveyed the lands in the disputed district in 1851, and two years later made grants therein. In 1882, however, an entry was made in the territory in controversy under the laws of Tennessee, and from a grant of that State in 1892 a controversy arose about the boundary line ; and two cases, *Belding* v. *Hebard*, 103 Fed. Rep. 532, and *Stevenson* v. *Fain*, 116 Fed. Rep. 147, decided in the Circuit Court of Appeals of the United States by Judge, afterward Mr. Justice, Lurton, of the Supreme Court, favoured the contention of Tennessee.

Claim of North Carolina not disputed until 1882.

To end this controversy, which was now full grown with two judicial decisions to its credit, and to correct the line between them, the States of North Carolina and Tennessee resorted to the Supreme Court of the United States, to determine the boundary line in dispute. The pleadings consisted of an original bill as amended, an answer and a cross bill on the part of Tennessee, and a replication by North Carolina. The case was argued by counsel and, as stated, the opinion was delivered by Mr. Justice McKenna. Without referring to the pleadings it will be sufficient for present purposes to quote a portion of the report of the commissioners who drew the line of 1821, accepted, ratified, and confirmed as the boundary between them by each of the States:

Text of the report of 1821.

Having met at the town of New Port in the State of Tennessee on the 16th day of July A. D. 1821, to settle, run and mark the dividing line between the two States, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord, 1799, to the Southern Boundary of the said States, . . . we proceeded to ascertain, run and mark the said dividing line as designated in the XIth Article called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of General Assembly of the State of North Carolina, entitled ' An Act for the purpose of ceding to the United States of America certain Western lands ' therein described, passed in 1789 : Which said dividing line as run by us, Begins at a stone set upon the north side of the Cataloochee Turnpike road, and marked on

[1] *State of North Carolina* v. *State of Tennessee* (235 U.S. 1, 9).
[2] *Ibid* (235 U.S. 1, 9). *Ibid.* (235 U.S. 1, 9–10),

the West Side *of* Ten. 1821 ; and the East Side N.C. 1821, running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian Town of Tellassee, crossing Porters gap at the distance of twenty-two miles from the beginning ; passing Meig's boundary line at thirty-one and a half miles : the Equonettly path at fifty three miles ; and crossing Tennessee River at the distance of sixty five miles from the beginning. From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill Towns, near the head of the West fork of Tellico River, and at the distance of ninety three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof at the Unicoy or Unaka Turnpike road, where a corner stone is set up, marked Ten. on the West side and N.C. on the East side ; and where a Hickory tree is also marked on the South side Ten. 101 m. and on the North side N.C. 101 m. being one hundred and one miles from our beginning. From thence a due course South two miles and two hundred and fifty two poles to a Spruce Pine on the North Bank of Highwasse River, below the mouth of Cane Creek ; thence up the said River the same course about one mile, and crossing the same to a Maple marked W.D. and R.A. on the South bank of the River ; Thence continuing the same course due south Eleven miles and two hundred and twenty-three poles to the Southern Boundary line of the States of Tennessee and North Carolina ; making in all one hundred and sixteen miles and two hundred and twenty three poles from our beginning ; and striking the Southern Boundary line twenty three poles West of a tree in said line, marked 72 m.—Where we set up a square post marked on the West Side Ten. 1821 ; on the East Side N.C. 1821 ; and on the South Side G. . . .[1]

The layman would find great difficulty in drawing the line from the above description, and it is not strange if judges, with the evidence before them and in the performance of their duties, disagreed—Judge Lurton on two occasions finding for Tennessee and the Supreme Court of the United States, in the case at hand, for North Carolina. But it should be said in behalf of Judge Lurton that he lacked evidence laid before the tribunal of which he later became a member, for the commissioners accompanied their reports by plats, of which one, duly certified, was given to each State. That given to North Carolina appears to have been lost when the State capitol was destroyed in 1832. The one filed with Tennessee was discovered in 1903 or 1904 by the State archivist among papers supposed to be worthless ; and, to make the chain complete, in November 1910 the field notes of one W. Davenport, the surveyor who accompanied the commissioners, were found by his grandson in a desk or sideboard which had belonged to him. The first three pages of the book are in Davenport's handwriting ; the other pages, with corrections here and there by Davenport, are in the handwriting of his wife, who it appears often acted as his amanuensis. The original book was exhibited at the argument, from which Mr. Justice McKenna in his opinion quotes the following entry :

W. Davenport's Field Book, July 18th, 1821.

July 19th, 1821, began at the Catalucha track to run the line between the State of North Carolina and Tennessee. Marked a rock there on North Carolina side N.C. 1821 and on the other side T.E.N. 1821—and runs with the line that J. McDowell, M. Matthews and D. Vance run in the year 1799, and runs with said line about 2 miles and a half to where they stopped.[2]

[1] *State of North Carolina* v. *State of Tennessee* (235 U.S. 1, 7–9).
[2] *Ibid.* (235 U.S. 1, 13–14).

These entries, the learned Justice says, are followed by ' the courses and distances, with trees by name of kind and other physical objects '.

It would be without present interest to enter into the details of the case, as the present purpose is to show the nature and extent of the boundary dispute, the evidence at hand for its determination, and the fact that, by a resort to the Supreme Court of the United States and by an examination of the evidence by the members of that international tribunal the line was drawn which had caused the States to fall out, perplexed judges, and baffled the authorities of the two States to settle amicably. As showing how this may be done in the future in a case similarly circumstanced, the following passage is quoted from the opinion of Mr. Justice McKenna, which shows, as it were, the Justice at work :

Evidence examined by the court.

The documents undoubtedly have inaccuracies and fault may be found with them, but allowing for it they have a direction and concurrent strength which cannot be resisted when combined with other testimony, and demonstrate that the commissioners did not locate the dividing line on the Hangover ridge but located it along Slick Rock Creek to Fodder Stack. Their report agrees with such line and the local topography justified its selection. The dividing line as run by them, they reported, began at ' a stone set upon the North side of the Cataloochee Turnpike road, running thence a southwesterly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwesterly on the extreme height thereof to where it strikes Tennessee River . . . and crossing Tennessee River at the distance of Sixty-five miles from the beginning '. Thus far there is no dispute or uncertainty. ' The summit ' of the mountain and its ' extreme height ' should determine the locality of the line and the Tennessee River at a distance of sixty-five miles from the beginning. The next call has no such certain and conspicuous witness. The river is crossed, and thence the line runs ' to the main ridge ' and then along the ' extreme height ' of it. The words of the call suppose an interval between the river and the ' main ridge ' whose extreme height thereafter is to be followed,—to be definite, a course up Slick Rock Creek to Fodder Stack. But granting that it could be literally satisfied without supposing such an interval, that is, connecting immediately with Hangover ridge, we must resort to the evidence to resolve the conflict of suppositions. We find the first established by the evidence which we have referred to and the marks on the trees. And these marks have of themselves great strength of proof, irresistible strength when combined with the other testimonies. They are the same in character as those on the undisputed part of the line, made, therefore, to define the continuity of the line, and the report explicitly states that the line was so defined in continuity—marked ' in its whole length '. We certainly cannot consider that a few trees—two or three only—identified as ' State-line trees ', marked on Hangover ridge satisfy this statement or determine that a line along that ridge was the ultimate one selected and the other but tentative, notwithstanding there were found on it from the river to Fodder Stack twenty-seven marked trees and from the latter point to the junction about as many more. Conjecture against this we cannot indulge. Imagination is not proof, and, we repeat, whatever might be said of any particular piece of evidence standing by itself, their union and concurrence amount to demonstration. And, we repeat, it must have been supposed by the States when they constituted the commission that judgment would have to be exercised, and, when exercised, should be binding. The contention of North Carolina is, therefore, sustained by the proof as to Slick Rock Basin.[1]

This settles the north-eastern part of the disputed territory called by the court the Slick Rock basin. The other portion in dispute was to the south-west of this,

[1] *State of North Carolina* v. *State of Tennessee* (235 U.S. 1, 14–15).

and is known as the Tellico territory. As to this Mr. Justice McKenna, speaking for the court, said :

The considerations which determine decision upon the contentions of the States as to the Slick Rock basin apply to the Tellico territory. Indeed, they make more strongly against the Tennessee contention. Without the newly discovered evidence the judicial judgment was adverse to that contention. *Stevenson* v. *Fain, supra.* The judgment is fortified by the evidence in this case. The comments of the court in that case and the considerations which have been expressed in this are sufficient to disclose the grounds of deciding that North Carolina is also right in its contention as to the Tellico territory and in the relief sought by its bill.

Mr. Justice McKenna therefore and thereupon was able to announce the judgement of the court, to the effect that :

Decree in favour of North Carolina.

A decree should be entered adjudging that the disputed part of the boundary line between the States of North Carolina and Tennessee which was run by the commissioners appointed by the respective States in 1821 and who made report thereof dated at Knoxville, Tennessee, August 31, 1821, descends from the extreme height of the mountain northeast of the Tennessee River, crosses the river at a distance of sixty-five miles from the beginning to a point on the southwest bank thereof just west of the mouth of the stream known as Slick Rock Creek, follows the creek a short distance to a ridge leading up to the main ridge, follows said ridge up to the summit known as Big Fodderstack Mountain and follows the main ridge thence to the junction of the Big Fodderstack and Hangover leads, and thence follows the main ridge of the Unaka Mountain southwesterly, according to the plat exhibited with this opinion.[1]

There could, therefore, be no doubt as to the meaning of the court. It stated the direction of the line in accordance with the report of the commissioners, confirmed by the notebook of the surveyor and the plat annexed to the report of the commissioners, likewise annexed and made a part of the decree by the Supreme Court. But, although this decided the controversy, it did not mark or trace the line whose direction was announced. Therefore, the decree continued :

Commissioners appointed.

And, further, that commissioners be appointed to permanently mark said line.[2]

It is intimated, in the comment upon the case of *Virginia* v. *West Virginia* (238 U.S. 202), decided in 1915, that the opinion of the court, delivered by Mr. Justice Hughes, was what might be called a matter of fact opinion, and it may be said of Mr. Justice McKenna's opinion in this case that it is very businesslike. It is a long cry from the case of *Rhode Island* v. *Massachusetts* (4 Howard, 591), the first case in which a final judgement was entered upon a hearing of a controversy between two States, to the present decision ; and in the meantime the court has become accustomed to decree for and against States. And while familiarity cannot in this instance be said to breed contempt, it engenders confidence, introduces the methods obtaining in business, and a feeling of assurance akin to command, of which Mr. Justice McKenna's concluding sentence may be cited as a fair example :

Counsel for the respective States are given forty days from the entry hereof to agree upon three commissioners and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the States.[3]

[1] *State of North Carolina* v. *State of Tennessee* (235 U.S. 1, 16–17). [2] *Ibid.* (235 U.S. 1, 17).
[3] *Ibid.* (235 U.S. 1, 17). For the final phase of this case see *State of North Carolina* v *State of Tennessee* (240 U.S. 652), *post*, p. 512.

75. State of Virginia v. State of West Virginia.

(238 U.S. 202) 1915.

The last phase of the case of *Virginia* v. *West Virginia* (234 U.S. 117), decided in 1913, to be considered was that in which counsel for the latter State asked leave, granted by the court, over the opposition of Virginia, to file a supplemental answer, claiming that certain items mentioned in the master's report were an asset of the State of Virginia on January 1, 1861, and therefore to be taken into account in fixing the proportion of the debt to be assumed by West Virginia. This question was referred to the master for investigation and report. This was done, and the original and supplemental report being before the court, the present case of *Virginia* v. *West Virginia* (238 U.S. 202), decided in 1915, was set for hearing upon the merits as disclosed by the pleadings and the reports of the master.

Case set down for final hearing.

Objections were made and argued to the allowance or disallowance of items by counsel in behalf of plaintiff, defendant, and, in some instances, the bond-holders, and the court, fully advised as to all phases of the case, familiar with every detail and appreciating fully its importance, proceeded to judgement. The honour fell to Mr. Justice Hughes to deliver what the court would no doubt consider to be the final opinion in the case. It was not, because West Virginia, against which State the judgement lay, failed to comply with it, and steps have been found necessary on the part of Virginia to seek execution at the hands of the court. The opinion, however, which Mr. Justice Hughes delivered, was the unanimous opinion of his brethren and of the court.

Of the many objections interposed by counsel to the report of the master, some relate to the allowance or disallowance of items in whole or in part, others concern questions of evidence and the weight to be given to it; still others involve questions of principle. All were of interest to the parties to the suit, but few have a permanent interest. Therefore the first class alone will be considered; the second noted in passing; and the third, very few in number, explained in order that the case and the principles involved in its decision be understandable and understood.

The first question to be taken up is that raised by counsel for Virginia in the supplemental answer filed on behalf of that State. By way of introduction to this phase of the case, and indeed as an introduction to its general consideration, a portion of the opinion of Mr. Justice Hughes is quoted, in which he summarizes, very briefly yet adequately, the conclusions of the master set forth in his reports. After stating that from the report of the master it appears that the matters mentioned as assets, and claimed as credits, were set forth as such in the supplemental answer for the first time, and that those items referred to in an earlier proceeding were in the main for a different purpose, 'The Master reports', in the language of the learned Justice, 'that, in his view, the assets as detailed by him were applicable according to their value as of January 1, 1861, to the public debt of Virginia which was to be apportioned as of that date; that the value of these assets amounted to $14,511,945.74, of which West Virginia's share—23½ per cent.—would be $3,410,307.25. That if this amount were to be credited to her in reduction of her liability, there should be offset certain moneys and stocks received by her from the Restored Government of

Report of the master.

Virginia aggregating $541,467.76, leaving a net credit to West Virginia of $2,868,839.49. This would reduce West Virginia's liability for principal from $7,182,507.46 to $4,313,667.97. The master also concluded that West Virginia by virtue of her contract with Virginia is liable for interest from January 1, 1861, the date as of which her share of the principal is determined.[1]

It appears that the moneys and securities in question had been specifically appropriated to the payment of the public debt. The money credits were in the form of cash in the sinking fund of January 1, 1861, and the securities on hand at that date purchased with the proceeds of the debt. The act of the General Assembly of 1838, authorizing the negotiation of loans, provided that stock purchased with the money so borrowed, together with dividends and other income accruing therefrom, should be 'appropriated and pledged' for the payment of interest and for the redemption of the principal borrowed. The Constitution of 1851 directed, by the 29th section of Article 4, the creation of a sinking fund, and in regard to the matter of stocks provided that 'The General Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund to be applied in like manner'. In 1853 the legislature established the sinking fund with a corresponding provision. On this state of facts Mr. Justice Hughes held on behalf of the court:

Judgement of the court.

The question then is not one of the division of public property, merely because of its character as such. In the light of the origin and nature of the investments which the Master has reviewed and valued, and of the provisions of the constitution and statutes of the State, it is clear that these particular assets must be regarded as a fund specially devoted to the payment of the debt to be apportioned. In this view, West Virginia is entitled to have these assets taken into account in fixing the amount of her liability. It cannot be conceived that, being held for the undivided debt, it was intended that they should be applied exclusively to Virginia's share. As West Virginia is to bear 23½ per cent. of the debt as it existed on January 1, 1861, she should be credited with a similar part of the fund, fairly valued, which had been pledged for its discharge. This equity is inherent in the obligation.[2]

It is to be observed that, in his computations, the master ascertained the liabilities of the States for the common indebtedness as of January 1, 1861, and Virginia and its committee of bond-holding creditors objected that the value of the assets should be ascertained as of June 20, 1863, which will be recalled was the date of separation of the States. The 8th section of Article VIII of the constitution of West Virginia taxed the State with 'an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one', and to ascertain this debt the assets on hand as of that date, not at some later date, would necessarily have to be considered. In determining the ratio of the debt when thus established, the value of property of each of the States at the date of separation could be taken, but the debt itself was to be fixed and determined by the Constitution of West Virginia, concurred in by Virginia, approved by the Congress of the United States, and which the court on various

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 206).
[2] *Ibid.* (238 U.S. 202, 207–8).

occasions had held to be a contract or compact between the States. On this point Mr. Justice Hughes aptly says :

Date of cleavage fixed by agreement, Jan. 1, 1861.

It is not to be doubted that this fixed January 1, 1861, as the date of cleavage with respect to the amount of the debt to be apportioned. It is not important that this date was prior to the separation of the two States. It was competent for the parties to fix a date, and they did so. The explanation of the selection may readily be found in the course of events, but it is sufficient to note that the selection was made. The ascertainment of the ratio of division must not be confused with the fixing of the amount to be divided. With regard to the former, we decided that we must look to the time when West Virginia became a State, that is, in determining the general resources of the two States when the separation was affected. 220 U.S., p. 34. But we did not refer to that time for the purpose of ascertaining the indebtedness which was to be apportioned. That, it was definitely stipulated by the agreement, was the debt as it stood on January 1, 1861. *Id.*, p. 27. It follows that credits then existing were to be applied as of that date. Otherwise, the net amount which equitably was to be divided would not be determined. For example, it is not disputed than on January 1, 1861, there were over eight hundred thousand dollars in cash in the sinking fund. If the amount of the debt was to be ascertained as of that date for the purpose of equitable division, the sinking fund would have to be credited as of the same date, either in reduction of the debt or by crediting each State her proper share according to her proportion of the debt. We know of no method of accounting which would settle and finally divide the debt as of January 1, 1861, and credit the sinking fund as of 1863. The same is true of the assets which had been specifically appropriated for the payment of the debt. The very ground of the credit of their value implies that it should be allowed as of the time fixed for the taking of the account of the indebtedness to be apportioned. The exceptions referred to cannot be sustained.[1]

For the sake of completeness it should be said, in this connexion, that the bondholders, not Virginia, objected to the refusal of the master to hold Virginia only liable for the amounts actually received instead of for their face value as of January 1, 1861. On this point Mr. Justice Hughes very properly said :

Terms of the contract.

The argument treats the ultimate realization by Virginia as the criterion. We must again refer to the contract. It was not intended to create and it did not create for the two States a partnership or community of interest in these assets, or provide that they should be held in trust by Virginia for West Virginia. It contemplated that each State should assume a fixed amount of the debt,—not that there should be equitable co-ownership of a sinking fund to be liquidated for joint account. It did not look to a future accounting for moneys realized after the vicissitudes of civil war. There was to be a complete and final determination of West Virginia's ' equitable proportion ' of the debt existing on January 1, 1861, and the account with Virginia was to be closed. As to this share of West Virginia, she was to establish her own sinking fund. There was, however, the equity arising from the fact that moneys and securities had been specially set apart for the payment of the debt. The facts as to this were well known and, as we have said, it cannot be supposed that West Virginia's fair and just proportion was to be fixed on a basis which denied her an appropriate share in the fund thus constituted, applying that which was meant for the whole only of Virginia's part. In view of the situation of the parties, and of the equitable adjustment which was contemplated, the question necessarily becomes one of valuation as of the selected date, and not solely of the amount realized in the later years.[2]

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 208–9).
[2] *Ibid.* (238 U.S. 202, 209–10).

Items in the account examined.

The court then passed to the objections made to the allowance or disallowance of various items in the master's report. The master was confronted with a serious difficulty in the case of stock of the Richmond, Fredericksburg, and Potomac Railway Company, which the State still owned; and the question was to the value at which this stock should be assessed. The master based his findings upon book value and earnings; Virginia and the bond-holders complained that he should have taken into account published quotations. On this point Mr. Justice Hughes cited authorities to show that market value, accredited price-current lists and market reports, including those published in trade journals or newspapers accepted as trustworthy, were admissible in evidence, but it was, of course, for the master to determine the weight to be given them, if admitted.

In an item concerning stock of the Alexandria, Loudon & Hampshire Railroad Company an interesting question arose as to the principle to be applied in assessing the value of this stock, and as it is of a general nature and of a permanent interest it should be considered, as the question of market value and the element entering into it was briefly discussed. In this special case there were no market quotations; it did not appear that dividends had ever been paid or profits earned. There was no statement of assets and liabilities, of traffic conditions or of results of operations, and, as Mr. Justice Hughes added, there was little knowledge of the physical conditions of the road. It did appear, however, that between the incorporation of the company in 1853 and January 1, 1861, Virginia had invested $993,248. All stock, including some purchased after January 1, 1861, was sold by Virginia, November 25, 1867, for $50,862.40, which was stated to be $5.00 a share. On this state of affairs West Virginia contended that the stock should be valued at par, for the twofold reason that this should be presumed to be its value and that Virginia had paid for it at that rate. On this point, of general and of permanent interest not merely to dabblers in stock but to states and nations possessed of it, Mr. Justice Hughes said and held on behalf of the court:

Principle for determining the value of stock.

Statements may be found to the effect that par value is *prima facie* actual value (*Appeal of Harris*, 12 Atlantic Reporter, 743; *Moffitt* v. *Hereford*, 132 Missouri, 513), but if such statements can be deemed to announce a comprehensive rule, to be applied in the absence of evidence as to the property and business of the corporation, we cannot regard it as well founded. There is no such presumption of law and common experience negatives rather than raises such an inference of fact. We took this view in *Fogg* v. *Blair*, 139 U.S. 118, 127, when we criticized the supposition 'that the court, in the absence of averment or proof to the contrary, would assume that it (stock) was worth par, or had substantial value'. See also *Griggs* v. *Dya*, 158 N.Y. 1, 23; *Warren* v. *Stikeman*, 84 App. Div. (N.Y.) 610; *Beatty* v. *Johnston*, 66 Arkansas, 529. Shares represent the proportionate interest of the shareholders in the corporate enterprise, and a rule that this interest in the absence of all supporting evidence should be taken as actually worth the par of the shares would be wholly artificial. There is no exigency in the administration of justice which requires or justifies such an extreme assumption.

In the present case, upon this record, it would be wholly improper to say that this stock was worth $993,248. Nor is there any evidence upon which we can ascribe value to it apart from the fact of the subsequent sale. West Virginia in claiming the credit had the burden of proving value, and it was not sustained save as value could be deduced from the amount of the proceeds. The exception must be overruled.[1]

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 219–20).

Other valuations.

Another item of interest is that connected with the loan to the Virginia & Tennessee Railroad Company, in regard to which West Virginia maintained that the loan should be taken at par, a contention which, according to the disposition of the previous item, would not be tenable, and that in any event the amount received in payment in 1863, presumably before the separation of the States, should be taken as the value of the loan in question. The facts are interesting, and the finding of the master, approved by the court, apparently unassailable; and the principle involved is susceptible of a broader, and indeed an international application. The facts, briefly stated, are that in 1853 Virginia loaned one million dollars to this company, and the loan outstanding on January 1, 1861, was secured by a mortgage. In 1863 payments were made in Confederate money amounting to $886,685, the equivalent of $97,601.46 in gold. West Virginia's claim was inconsistent, in that it did not ask that the loan be estimated at $1,000,000.00, which would be its par value, but at the value at the time of payment, which admitted the acceptance of a lesser sum than the face value. There was no evidence apparently before the master or which might be procured to show the value of this asset on the 1st day of January, 1861. Otherwise it would have been considered, and resort would not have been made to the indirect method of determining its value by its sale in 1863, and then of computing its value as of 1861, as, according to the holding of the court in this very case, amounts subsequently received were not to be taken as fixing the amount of the debt due at the date of adjustment of the liability in 1861.

In the absence, however, of other testimony, the sale in 1863 could be considered, and the actual, not the fictitious value, was to be chosen if the value of the asset could not properly be fixed in terms of depreciated currency, such as the Confederate currency, and such as any inflated currency would be, but in currency as of that date fairly representing purchasing power. The master computed this item, close to a million in Confederate currency, at $84,799.90 in gold, and, over the objection of West Virginia, the court, for the reasons stated, approved the finding.

Another item to be considered as one of principle, not of detail, is the treatment accorded bank stocks by the master and approved by the court. In estimating the value of these stocks the master took their book value, deducting therefrom five per cent., against the objection of counsel for West Virginia, that the full book value should have been allowed. On this point Mr. Justice Hughes said, for himself and the court which he represented:

It is urged that Virginia continued to own the shares and that no process of liquidation was necessary. But the deduction did not proceed upon the view that an actual liquidation was required. The Master's conclusion was based upon the unassailable ground that the book value only represented the amount which, according to the books, could be obtained from the assets upon a liquidation; that thence the book value did not represent the actual net value of the shares; and that this actual value could not be estimated without a proper allowance for the expense of realization. He made this allowance upon a basis sustained by the evidence, and there is no reason for disturbing his finding.[1]

Without following Mr. Justice Hughes into his painstaking examination of all the objections raised to the master's report and findings, and which, with the exception of the matters already mentioned, relate to detail and not to principle, the

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 226–7).

learned Justice found, with sundry corrections and modifications of the master's original report, especially the claim set forth in the supplemental answer of West Virginia, which was allowed both by the master and the court, that West Virginia's share of the principal debt of $30,563,861.56, upon the ration of 23½ per cent., to be $7,182,507.46; that, estimating the share of West Virginia to the assets of $14,929,161.44 at $3,508,352.94, and debiting West Virginia with the moneys and securities received from the Restored Government of Virginia at $541,467.76, there was a net credit to West Virginia of $2,966,885.18. Subtracting this credit from West Virginia's proportionate share of the principal debt, in which this credit was not included, West Virginia's share of the principal debt would amount to the sum of $4,215,622.28, if the State were not to be taxed with the payment of interest upon its adjudged indebtedness.

Net amount of debt without interest.

The question of interest had been reserved for subsequent consideration in the hearing of the case upon its merits, *Virginia* v. *West Virginia* (220 U.S. 1), decided in 1911, in the hope that the States would confer and agree upon this question, and thus avoid the necessity of having it decided by the court, which was evidently reluctant to adjudge interest against a State as if it were a private party. But the States were unwilling or unable to agree. Virginia contended for the allowance of interest, inasmuch as the debt was, in its opinion, an interest-bearing one, and therefore it had both allowed and computed interest in the adjustment of its indebtedness; whereas West Virginia contended that interest should not be allowed. The reasons are thus summarized and the method of treating the question thus stated by Mr. Justice Hughes:

> This liability is contested upon the grounds that the claim of Virginia has been unliquidated and indefinite, that interest is not recoverable as damages save on default in the payment of an amount which is certain or susceptible of ascertainment, that there was no promise on the part of West Virginia to pay interest, that unearned interest was not a part of the debt of which she agreed to assume an equitable proportion, and that in the absence of an express promise interest is not to be charged against a sovereign State.[1]

So much for the reasons; next for the point of approach, which must necessarily depend upon the agreement, contract, or compact of the parties. Thus, Mr. Justice Hughes continues:

The question of interest depends upon the contract.

> All the questions thus raised may be resolved by the determination of the fair intendment of the contract itself. If liability for interest is within the scope of the agreement no objection can lie on the ground of uncertainty in amount, as the promise attaches to the amount found to be payable. In this view, also, no question would be involved as to an award of interest by way of damages as distinguished from a recovery by virtue of the terms of the undertaking. Nor can it be deemed in derogation of the sovereignty of the State that she should be charged with interest if her agreement properly construed so provides. The fundamental question is, What does the contract mean?[2]

The learned Justice thereupon takes up the nature of the indebtedness and finds what could not be denied, that the bonds and instruments evidencing debt were interest-bearing, and that the debt, therefore, was to be considered as such. As the obligation, therefore, was an interest-bearing one, it would follow that, after as

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 233).
[2] *Ibid.* (238 U.S. 202, 233–4).

before January 1, 1861, interest should enter into the liability of the parties, and, assuming an equitable portion of this liability, the principal of the debt, together with interest, could hardly be considered inequitable. 'The very purpose of the contract', he said, 'was to secure—as between these parties—Virginia's exoneration with respect to that share. As it was plainly not the intention either that the bondholders should go without interest as to the proportion assumed by West Virginia, or that there should be left with Virginia the entire burden of meeting the interest on the outstanding bonds while the principal was apportioned, it must follow that the assumption of an equitable share by West Virginia related to the liability for both principal and interest. We cannot read the contract otherwise.'[1]

Such would seem, on general principles, to be the duty of each State, for each or neither was to be taxed with the payment of interest. But it is not necessary to rely alone upon general principles, however persuasive they might be if standing by themselves, for the express language of the Constitution of West Virginia seems clearly to contemplate the payment of interest. Thus, after stating the assumption of an equitable proportion of the debt, the second clause of the 8th section of Article 8 stipulates that 'the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years'.

Interest contemplated by the Constitution of West Virginia.

It is no doubt true that the obligation was assumed by the first clause, and the method of meeting that obligation by the second, that the obligation itself would stand if the method should fail, and that insistence upon the letter might kill the spirit of the clause, inasmuch as the payment of interest might be made upon the apportionment of the principal by the legislature. But, irrespective of the amount to be assumed and of the method by which it was to be made, the intent of West Virginia, approved by the Congress and concurred in by the Restored Government of Virginia, was that not only the principal assumed but interest thereon should be paid. If West Virginia had not then believed it equitable to pay interest, it could, in its sovereign pleasure, have denied the liability to pay interest; it could have left the matter doubtful by omitting to include the term 'interest' in the Constitution. But it did include it, and having done so it was bound by the necessary, logical or ordinary consequences of its act. As Mr. Justice Hughes properly says:

The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfillment. It is urged that there are equities to be considered, but we can find none which go so far as to destroy the claim. On the contrary, there is no escape from the conclusion that there was a contract duty on the part of West Virginia to provide for accruing interest as a part of the equitable proportion assumed, and that it would be highly inequitable as between the two States that Virginia as to her share should bear interest charges for these fifty years while West Virginia on her part should simply pay a percentage of principal reduced by the credits which have been allowed.[2]

Decision that interest is due.

But although there was no equity in the contention of West Virginia that it should not be held to the payment of interest, there was clearly an equity in the contention

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 235).
[2] *Ibid.* (238 U.S. 202, 236).

that it should not pay the legal rate of interest for which the bonds called, inasmuch as Virginia refunded its indebtedness upon a lower rate of interest, and that West Virginia should therefore be taxed with a rate of interest which, in view of the refunding of the debt and of the attendant circumstances, should be considered equitable. This view appealed to the court and was thus expressed by Mr. Justice Hughes on its behalf :

Rate of interest considered.

While liability for interest exists, there is still the question as to the rate at which interest should be allowed. Virginia, it appears, has not paid upon her estimated share the rate which was reserved in the bonds. This fact, we think, raises an equity demanding recognition. In fixing West Virginia's share of the principal, we took into account the fact that Virginia, by the consent of the creditors, had reduced her own share below the amount which it would have been upon the basis we found to be correct, and we gave appropriate credit to West Virginia on account of this difference. 220 U.S., p. 35. And it would not be proper to hold West Virginia to the rate of interest specified in the bonds when Virginia as to her share has made arrangement with the creditors for a lower rate. The provision that the share of West Virginia shall be an equitable proportion is the dominating principle of the award, and while Virginia as we have held is entitled to enforce the contract, in the due performance of which her honor and credit are concerned, her action with respect to her own estimated share must be taken into consideration.[1]

Virginia's arrangement with creditors to be allowed for.

After sketching the legislation of Virginia by which this portion of the indebtedness of that State was abolished, and calling attention to the fact that Virginia considered and stated in its bill that such a settlement was both final and satisfactory, Mr. Justice Hughes takes up and thus summarizes the results of the legislation by which this part of Virginia's indebtedness was finally and satisfactorily settled :

In the light of this financial history, we come to the consideration of Virginia's payments. It is stated on behalf of Virginia that the amount of interest paid by her from January 1, 1861, to September 30, 1913 (the latest date to which the calculation has been made), amounted to $41,071,219.02. Taking Virginia's share of the principal at the amount assumed by her, as computed in our former decision (220 U.S., p. 35), that is $22,598,049.21 (an amount somewhat less than her true proportion of the total debt of January 1, 1861), the total interest paid as above stated would be the equivalent of simple interest upon that principal at a rate somewhat less than three and one-half per cent.

Retired bonds to be allowed for.

But these payments on account of interest did not include bonds that had been retired, and Virginia's exhibit shows that in addition to these payments she had ' paid off and retired ' (down to September 30, 1913) bonds amounting to $12,141,591.49 ; and that, further, her new bonds issued for the portion of the old debt, funded and assumed by her, and outstanding on September 30, 1913, amounted to $24,645,075.23. These items including the item of interest first mentioned make a total of $77,857,885.74. We have in this aggregate the amounts paid by Virginia on account of the old debt to the date mentioned. If from this total we deduct the amount of Virginia's assumed share of principal, as above computed ($22,598,049.21), the remainder would be $55,259,836.53 ; or, if all payments of interest were put on a gold basis, $53,002,130.40. If we treat this entire sum as applicable to interest—and to interest upon Virginia's assumed share alone—it would be the equivalent of simple interest upon the principal stated, from January 1, 1861, to September 30, 1913, at a rate a little less than four and one-half per cent.[2]

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 236–7).
[2] *Ibid.* (238 U.S. 202, 240–1).

After calling attention to the fact that the total amount of interest paid by Virginia upon its indebtedness included interest upon interest, and that it would be inequitable to subject West Virginia to Virginia's financial method of computing and paying interest, and that, in the light of the facts recited, a fair basis of adjustment was to be found, the learned Justice continued :

It will be observed that the amount of the new bonds shown by Virginia's statement to be outstanding on September 30, 1913, was slightly in excess of her assumed share of principal as computed. That is, Virginia through the successful operation of the Act of 1892 (which provided for a refunding as of July 1, 1891), taken with what had been effected under the Act of 1892, placed an amount substantially equal to her assumed share of principal upon a permanent basis of three per cent. There appears to be an exception to this in the case of certain securities, but their amount is relatively small. Virginia's creditors may have been induced to accept this adjustment, and the low rate it involved, by reason of the inclusion of unpaid interest in fixing the principal of the new bonds. But, on the other hand, the total of the principal and interest then outstanding was largely reduced in the refunding, and the rate of interest upon the new bonds under the Act of 1892 for the first ten years was made two per cent. The reduction, and the ten years' rate, may well be regarded as offsetting the advantage derived from including in the face of the new obligations whatever excess there may have been over the assumed share of Virginia as computed.[1]

In view of these circumstances, therefore, and, as he said,

'taking all the facts into consideration, we reach the conclusion that in fixing the equitable proportion of West Virginia, her part of the principal should be put on a three per cent. basis, as of July 1, 1891 ; that is, that interest should run at that rate from that time. For the preceding period, from January 1, 1861, to July 1, 1891, there is greater difficulty. In recognition of the amounts paid by Virginia upon her share, but also having in mind the payments of compound interest attributable to her own exigency, the nearest approach to complete justice will be had by allowing interest at four per cent.' [2]

Interest allowed at two rates.

Under this method of adjustment, which Mr. Justice Hughes, on behalf of the court, considered as adequately recognizing and enforcing the equities of both States, West Virginia's share of the interest from January 1, 1861, to July 1, 1891, at the rate of 4 per cent., would amount to $5,143,059.18, and from July 1, 1891, to July 1, 1915, at 3 per cent., to $3,035,248.04, making a total in the matter of interest of $8,178,307.22, which, added to the principal of $4,215,622.28, found to be West Virginia's equitable portion of the indebtedness, would give a total of $12,393,929.50.

This is a very matter-of-fact statement with which to end a decree of an international tribunal, for such the Supreme Court is, in a long drawn out, difficult, and vexatious controversy between two States. But the final sentences, two in number, are even more matter-of-fact and businesslike, showing how the judicial settlement of suits between States had become, as it were, a matter of course. Thus :

The decree will also provide for interest at the rate of five per cent. per annum upon the amount awarded, until paid.

Subsequent interest at 5 per cent.

Costs to be equally divided between the States.[3]

Costs to be shared equally.

[1] *State of Virginia* v. *State of West Virginia* (238 U.S. 202, 241–2).

[2] *Ibid.* (238 U.S. 242).

[3] *Ibid.* (238 U.S. 242). For the succeeding phase of this case see *State of Virginia* v. *State of West Virginia* (241 U.S. 531), *post*, p. 512.

76. State of North Carolina v. State of Tennessee.

(240 U.S. 652) 1916.

Commissioners' report agreed on by both parties.

In the first phase of the case of *North Carolina* v. *Tennessee* (235 U.S. 1), decided 1914, Mr. Justice McKenna, speaking for the court, gave the States in controversy forty days from the entry of the decree within which to agree upon commissioners and to present to the court for its approval a decree in accordance with its directions establishing the boundary line between the two States. Commissioners were appointed, the line drawn, and the report of the commissioners presented by counsel for complainant and concurred in by counsel for defendant. On April 3, 1916, a motion was made by counsel for North Carolina, concurred in by counsel for the defendant, ' to confirm the report of the Commissioners heretofore appointed by this court to ascertain, re-trace, re-mark, and re-establish the real, certain, and true boundary line between the States of North Carolina and Tennessee between certain points, mentioned in said report. . . .' [1] The report of the commissioners, dated October 20, 1915, establishing the exact boundaries in accordance with the decree in the first case of *North Carolina* v. *Tennessee* was presented to the court, and

Decree accordingly.

On consideration whereof,

It is now here ordered, adjudged, and decreed by this Court that the real, certain, and true boundary line between the States of North Carolina and Tennessee between said certain points is as delineated in the said report and on the map attached hereto and made a part hereof.

It is further ordered, adjudged, and decreed that each party pay one-half of the costs in this case.[2]

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The decree in the previous case of *Virginia* v. *West Virginia* (238 U.S. 202), decided June 14, 1915, was doubtless expected to be the last in this series of cases. It was not. On June 5, 1916, that is to say, a year thereafter, the Attorney-General for the State of Virginia submitted a motion for a writ of execution against the State of West Virginia, which was denied by the court June 12, 1916, in *Virginia* v. *West Virginia* (241 U.S. 531).

Virginia moves for a writ of execution.

Because the case is still pending and because the question of execution, delicate and difficult, is considered by the court in the next phase of this controversy, it is inadvisable to indulge in comment. It is the part of wisdom to allow the opinion of the court, by its most accredited representative, Mr. Chief Justice White, to speak for itself :

Motion denied without prejudice.

In the original cause of *Commonwealth of Virginia* v. *State of West Virginia*, on June 14, 1915, a decree was rendered in favor of Virginia and against West Virginia for the sum of $12,393,929.50 with interest thereon at the rate of five percentum from July 1st, 1915, until paid. 238 U.S. 202. Virginia now petitions for a writ of execution against West Virginia on the ground that such relief is necessary as the latter has taken no steps whatever to provide for the payment of the decree. West Virginia resists the granting of the execution on three grounds : (1) ' Because the State of West

[1] *State of North Carolina* v. *State of Tennessee* (240 U.S. 652). [2] *Ibid.* (240 U.S. 652, 668).

Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity; because her Legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen;' (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if in the exercise of jurisdiction such a judgment was entered.

Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.

The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the legislature of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment.[1]

78. State of Arkansas v. State of Tennessee.

(246 U.S. 158) 1918.

A boundary dispute. Sudden diversion of the Mississippi, 1876.

Within a few months of the 100th anniversary of the Declaration of Independence of the thirteen United States of America, to be accurate, on the 7th day of March, 1876, the Mississippi River suddenly changed its course to the eastward, cutting through a space of two miles, separating a small portion of territory hitherto part of the Tennessee mainland and making of it an island of the Mississippi opposite the State of Arkansas. The new channel thus suddenly made became the chief channel of the river at this point and the old channel to the west dried up. The lay of the land at the time of the avulsion is thus stated by Mr. Justice Pitney in delivering the opinion of the Supreme Court in *Arkansas* v. *Tennessee* (246 U.S. 158), decided in 1918, to which the action of the river gave rise:

Original course of the river.

The river flowed southward past Dean's Island on the Arkansas side, made a bend to the westward at or about the southernmost part of this island, and then swept northerly and westerly around Island No. 37 (Tennessee), a lesser channel known as McKenzie Chute passing between that island and the main Tennessee shore; the main and lesser channels met at the southwestern extremity of Island No. 37, and the river flowed thence southwesterly past Point Able, Tennessee, opposite which it turned again easterly and then northerly, forming what is known as the Devil's Elbow, and flowed thence easterly or northeasterly around Brandywine Point or Island (Arkansas), until it came within a distance of about two miles from the place where it started its northerly turn opposite Dean's Island; and at this point it turned again to the southward.[2]

The change of channel and the condition consequent thereupon are thus described by the same learned Justice:

On March 7, 1876, the river suddenly and with great violence, within about

[1] *State of Virginia* v. *State of West Virginia* (241 U.S. 531, 531–2). For a later phase of this case see *State of Virginia* v. *State of West Virginia* (246 U.S. 565), *post*, p. 519.

[2] *State of Arkansas* v. *State of Tennessee* (246 U.S. 158, 161).

New course.

thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, so that the old channel around the bend of the elbow (a distance of fifteen to twenty miles) was abandoned by the current, and although it remained for a few years covered with dead water it was no longer navigable except in times of high water for small boats, and this continued only for a short time, since the old bed immediately began to fill with sand, sediment, and alluvial deposits. In the course of time it became dry land suitable for cultivation and to a considerable extent covered with timber. The new channel is called, from the year in which it originated, the 'Centennial Cut-off,' and the land that it separated from the Tennessee mainland goes by the name of 'Centennial Island'.[1]

In view of the fact that the treaty of 1763, by which Great Britain obtained the territory to the east of the Mississippi; the treaty of 1783, by which the United States obtained a recognition on the part of Great Britain of its title to that territory; and the treaty of 1803, by which the United States obtained title to territory to the west of the Mississippi, have been discussed in various cases involving boundaries between States bordering upon that noble river, it is unnecessary to enter into details, and the reader may well content himself with the following statement of the historical setting of the case, as made by Mr. Justice Pitney:

Summary of the treaties and statutes.

By the treaty of 1763 between England, France, and Spain, Art. VII (3 Jenkinson's Treaties, 177, 182), the boundary line between the British and French possessions at this place was established as 'a line drawn along the middle of the River Mississippi', with consequent recognition of the dominion of France over the Territory now comprising the State of Arkansas, and the dominion of Great Britain over that now comprising the State of Tennessee. By the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80, the territory comprising Tennessee passed to the United States, its westerly boundary being described (Art. II), as 'a line to be drawn along the middle of the said River Mississippi'. It formed a part of the State of North Carolina. In the year 1790, North Carolina ceded it to the United States (Act of April 2, 1790, c. 6, 1 Stat. 106). In a report made in the following year by Thomas Jefferson, then Secretary of State, and submitted to Congress by President Washington, the bounds of the ceded territory were described, the western boundary being 'the middle of the river Mississippi'. 1 American State Papers, Public Lands, p. 17. And by Act of June 1, 1796, c. 47, 1 Stat. 491, the whole of the territory thus ceded was made a State. By the Louisiana Purchase, under the Treaty of April 30, 1803, 8 Stat. 200, the territory comprising Arkansas was acquired by the United States from France. It was admitted into the Union as a State by the United States as a State by Act of June 15, 1836, c. 100, 5 Stat. 50, its easterly boundary being described as 'middle of the main channel of the said river'.[2]

If these were all the facts involved in the case, it would hardly merit separate consideration, inasmuch as it has been so repeatedly held by the Supreme Court as to be beyond the possibility of successful contention, that the boundaries between States are not changed by avulsion, and that therefore the line runs in the dry bed where before it had run in the flowing water.

Counsel for the State of Arkansas admitted this principle; counsel for Tennessee did not contest it, but sought to avoid its application in the present instance by maintaining that, from the first evidence which they had of the flow of the river in 1823 to the change of the channel in 1876, the river had gradually shifted its course

[1] *State of Arkansas* v. *State of Tennessee* (246 U.S. 158, 162).
[2] *Ibid.* (246 U.S. 158, 160–1).

to the eastward, depriving the State of Tennessee of a small strip of its territory; that the changes made by the slower and the sudden change of the river were to be considered together, and the strip of land thus laid bare, lost to Tennessee by erosion, should be restored to it on the theory of reliction, by which submerged lands revert to their original owners. The basis for this contention is thus stated by Mr. Justice Pitney:

It is agreed that in 1823, the river ran substantially as indicated upon the Humphreys map, and that between that year and the year 1876 the width of the channel, by erosion and caving in of the Tennessee bank south, southwest, and west of Dean's Island, along the mainland and Island No. 37, had increased from its former width of about a mile or less to a width of $1\frac{1}{4}$ or $1\frac{1}{2}$ miles, with consequent narrowing of the neck of land opposite Dean's Island.[1]

In 1874 a map was made by Colonel Suter under the direction of the War Department, and was accepted by the States as giving the geographical situation as it existed in 1876, just as the Humphrey map was relied on for the situation as it existed in 1823.

Litigation in the courts of the States.

The situation produced by the sudden change in the course of the Mississippi had been the source of much litigation in the courts of Tennessee, in which the State had brought action as early as 1903 against one Cissna and others to restrain them from cutting timber upon those portions of the land claimed by that State, and for an accounting for the timber already cut; and thus to determine the boundary between Tennessee and Arkansas in a suit to which the State of Arkansas was not a party. In each of its phases the defendants denied the jurisdiction of the Tennessee courts and carried the case to the Supreme Court of the United States from a judgement of the Supreme Court of Tennessee, where, to quote the language of Chief Justice White in *Cissna* v. *Tennessee* (242 U.S. 195, 197), 'The judgment of the Supreme Court of the State not only decreed the lands to belong to the State of Tennessee in its sovereign capacity, on the ground that they were situated within that State, but gave a recovery for the amount of the timber cut before the bringing of the suit and also for the money value of the balance of the timber on the lands which had been cut and removed as the result of the modification of the injunction permitting that to be done.'

It was admitted on appeal that a decision of the case between the State and private parties would determine the facts upon which the boundary between the two States was dependent, and that it would therefore determine the boundary between the States, which necessarily was a Federal question involving the interests of the Union. In the meantime, the State of Arkansas had filed its bill in the Supreme Court to have the boundaries between the two States determined by that tribunal. The justices of the Supreme Court were therefore unwilling to decide the question of boundary in an action to which Arkansas was not a party, or to find the facts in such an action which would necessarily decide the issue in the controversy between States where the Supreme Court had assumed jurisdiction. Mr. Chief Justice White, speaking for his brethren, therefore directed that the case on appeal be 'assigned for hearing at the same time and immediately after the coming on for hearing of the original boundary suit between the two States. And to the end that that hearing

[1] *State of Arkansas* v. *State of Tennessee* (246 U.S. 158, 161–2).

may be expedited, we say in addition, first, that if the facts in the boundary case be stipulated by the parties either by reference to the facts shown in this case or otherwise, both the cases will be taken on submission on printed briefs, if the parties are so advised ; or second, if they are not so advised, upon an agreement and stipulation as to the facts in the boundary case, that case and this will be ordered advanced and assigned for oral argument at an early day.' [1]

In accordance with the suggestion of the Chief Justice, an answer on the part of Tennessee and a replication thereto on the part of Arkansas were filed and the cause of action was brought to hearing upon facts stipulated by the august litigants.

In view of the decision of the Supreme Court in the leading case of *Iowa* v. *Illinois* (147 U.S. 1), decided in 1893, and the affirmance of that decision in *Louisiana* v. *Mississippi* (202 U.S. 1, 49), decided in 1906, *Washington* v. *Oregon* (211 U.S. 127, 134), decided in 1908, and the second of the same case (214 U.S. 205, 215), decided in 1909, holding that the mid-channel, the channel of commerce, or the *thalweg* is the line of boundary between riparian States in the absence of a special agreement modifying this principle of international law, it does not seem necessary or advisable to discuss the contention of Tennessee, advanced in the present case and contained in the holdings of its courts, that the boundary between the two States is a mathematical line equally distant between the well-marked banks of the river. Nor is it necessary to consider the case of *Cessill* v. *State* (40 Arkansas, 501), decided in 1883, in which the Supreme Court of Arkansas held the boundary to be a line along the river bed equally distant from the permanent and defined banks of the ascertained channel on either side, inasmuch as that case, and other cases invoked by counsel for Tennessee had, to quote the language of Mr. Justice Pitney, ' for their object the establishment of a proper rule for the administration of the criminal laws of the State and were entirely independent of any action taken or proposed by the authorities of the State of Tennessee.' ' These decisions had ', to quote again Mr. Justice Pitney's language, ' no particular reference to that part of the river bed that was abandoned as the result of the avulsion of 1876.' Indeed, as pointed out by the learned Justice, ' they dealt with parts of the river where the water still flowed in its ancient channel.' [2]

The court therefore was of the opinion that the Arkansas decisions invoked by Tennessee did not establish an acquiescence on the part of the former State in the contention of the latter in the sense in which that term was understood, defined, and applied in *Rhode Island* v. *Massachusetts* (4 How. 591, 638, 639), decided in 1846, and repeatedly affirmed and followed by later decisions of the Supreme Court. The really important contention in this case, which differentiated it from others involving avulsion, was that ' after the old channel ran dry, the owners of the banks and the bed should be restored to their own, according to the original boundaries fixed before the river changed its course or moved laterally in its bed, such lands being still susceptible of definite location.' [3]

Standing alone, this contention might be accepted, but it did not stand alone, as counsel for Tennessee contended further, as stated by Mr. Justice Pitney, ' that since the avulsion of 1876 caused the old river bed to dry up, what is called " the doctrine

[1] *Cissna* v. *State of Tennessee* (242 U.S. 195, 198).

[2] *State of Arkansas* v. *State of Tennessee* (246 U.S. 158, 172). [3] *Ibid.* (246 U.S. 158, 168–9).

of submergence and reappearance of land'' must be applied, so as to establish the ancient boundary as it existed at the time of the earliest record, in this case the year 1823, with the effect of eliminating any shifting of the river bed that resulted from the erosions and accretions of the half century preceding the avulsion.' [1] In support of their contention counsel for Tennessee invoked the great authority of Lord Chief Justice Hale, who said in Chapter 4 of his tractate *De Jure Maris* :

'The doctrine of submergence and reappearance.'

If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it ; or though the marks be defaced ; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety ; and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years.

Admitting the law to be as thus stated—and other authorities were cited in its behalf although that of the great Lord Chief Justice was sufficient—it plainly did not apply to the present case, in that it referred solely to a sudden change of the sea, which admittedly changed title to property, whereas, by the gradual change produced by erosion, the boundary line had shifted, so that the line between the States was to be taken as it existed in 1876, as changed by gradual process before the sudden change due to avulsion. Or, as Mr. Justice Pitney expressed it :

The court holds the doctrine to be inapplicable.

A reference to the context shows that the portion quoted is a statement of one of several exceptions to the general rule that any increase of land *per relictionem*, or sudden recession of the sea, belonged of common right to the King as a part of his prerogative. It amounts to no more than saying that where the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification. . . . Certainly it cannot be regarded as having the effect of carving out an exception to the rule that where the course of the stream changes through the operation of the natural and gradual processes of erosion and accretion, the boundary follows the stream ; while if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion ; but when the water becomes stagnant, the effect of these processes is at an end ; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel. To give to it such an effect is, we think, to misapply the rule quoted from Sir Matthew Hale.[2]

Avulsion leaves the boundary unchanged.

It is perhaps difficult, if not impossible, to make the meaning of the court clearer than it has, and yet it may nevertheless be said that, in effect, the court held that changes produced by gradual process, such as erosion and accretion, were to be kept separate and distinct from changes produced by violent processes such as avulsion ; that one changed boundary, the other did not, and that where erosion or accretion had shifted the line before avulsion, the line was to be taken, after avulsion, where it had been left by erosion and accretion irrespective of the doctrine of submergence

[1] *State of Arkansas* v. *State of Tennessee* (246 U.S. 158, 174).
[2] *Ibid.* (246 U.S. 158, 175–6).

and emergence, which might apply between the private citizen and his State in accordance with the principles of municipal law but not between two States in accordance with international law. This latter distinction the learned Justice is careful to point out, saying that the disposition of land emerging on either side of an interstate boundary stream ' as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them.' [1]

After citing cases in support of this view, he refers to the different rule of property existing in the contending States, saying :

Thus, Arkansas may limit riparian ownership by the ordinary high-water mark ; and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark, may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.[2]

Judgement of the court in favour of Arkansas.

Applying these views and speaking for a unanimous court, Mr. Justice Pitney was amply justified, both in law and practice, to conclude that :

(1) The true boundary line between the States, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

(2) By the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

(3) The boundary line should now be located according to the middle of that channel as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.

Commission to be appointed.

(4) A commission consisting of three competent persons, to be named by the court upon the suggestion of counsel, will be appointed to run, locate, and designate the boundary line between the States at the place in question in accordance with the above principles.

(5) The nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876, and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.[3]

The decision in the boundary dispute, wherein the State of Arkansas was plaintiff and the State of Tennessee was defendant, was rendered on March 4, 1918. The decision in the case of *Cissna* v. *Tennessee* (246 U.S. 289), which had been postponed, followed seven days later, from which the following passage may be quoted from the

[1] *State of Arkansas* v. *State of Tennessee* (246 U.S. 158, 175–6).
[2] *Ibid.* (246 U.S. 158, 176).
[3] *Ibid.* (246 U.S. 158, 177). For a later phase of this case see *State of Arkansas* v. *State of Tennessee* (247 U.S. 461), *post*, p. 534.

opinion of Mr. Justice Pitney, delivering the opinion of the court in that case upon appeal:

Consequential reversal of a decision in the Tennessee Courts.

It is a part of the law of interstate boundaries, that where a running stream forms the boundary, if the bed and channel are changed by the natural and gradual processes of erosion and accretion, the boundary follows the varying course of the stream; while if the stream suddenly leaves its old bed and forms a new one, the resulting change of channel works no change of boundary, which remains in the middle of the old channel although no water be flowing in it. *Arkansas* v. *Tennessee, supra.* A correct application of this rule to changes in the Mississippi is necessary in order that proper effect may be given to the treaties and acts of Congress by which that river was established as an interstate boundary, and hence this is a question of federal law. The state court acknowledged the rule in theory, but departed from it in fact. Starting with the Humphreys map as showing the location of the banks of the river as they were in 1823, the date to which the earliest records related, and finding from the evidence that between that date and the time of the avulsion there had been gradual erosions from the Tennessee bank at the place where the land in controversy is situate, to an extent sufficient in the aggregate to increase the width of the river from a little less than a mile to between $1\frac{1}{4}$ and $1\frac{1}{2}$ miles, the court held that the subsequent emergence of the bed of the river at this place, consequent upon the avulsion of 1876, had the effect of pressing back the line between the States to the middle of the old channel as it ran in 1823, so as to restore to Tennessee what it held before the erosions from its banks. This result was reached by grafting upon the acknowledged rule as to boundary streams an exception deduced from the rule of the common law that lands once swallowed by the sea, if afterwards exposed by its recession, are restored to the former owner if they can be identified. As we have pointed out in *Arkansas* v. *Tennessee*, it is a misapplication of this doctrine to treat it as forming an exception to the established rule respecting the effect of erosion, accretion, and avulsion upon the course of a boundary stream.

We conclude, therefore, that the court erred in awarding to the State of Tennessee a recovery of any land or damages for cutting and removing timber from any land lying without the limits of the State as defined in our opinion in *Arkansas* v. *Tennessee, supra*, being a line drawn along the middle of the main channel of navigation of the Mississippi River (as distinguished from a line midway between the visible and fixed banks of the stream) as it was at the time when the current ceased to flow therein as a result of the avulsion of 1876, and without regard to changes in the banks or channel that had occurred through the natural and gradual processes of erosion and accretion prior to the avulsion.

It results that the judgment of the state court must be

Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

79. State of Virginia v. State of West Virginia et al.

(246 U.S. 565) 1918.

Question of execution becomes acute.

There is reason to believe that the members of the Supreme Court are heavy at heart when they think of the case of *Virginia* v. *West Virginia*, and that they are uncomfortable when it is mentioned in their presence; and the reader may admit a feeling of this kind when staid and learned judges would not. For the case has just made its ninth appearance, and Virginia is still awaiting its just dues, although it has a judgement in its favour which West Virginia cannot contest, but is unwilling to satisfy.

The suit was begun in 1906 and the judgement rendered nine years later. To the lawyer, however, the controversy is one of perennial interest, for in it, as in the litigation between Rhode Island and Massachusetts, important principles of law and procedure are being determined. Indeed, the question facing the court, upon the insistence of Virginia, is nothing less than the power of Congress or of the court to devise or to issue execution against the State of West Virginia to compel it to satisfy the judgement against it in behalf of the State of Virginia, which the court has been unwilling to do of its own accord in every case of suit by State against State decided in the Supreme Court of the United States. In the last phase of *Virginia* v. *West Virginia* (241 U.S. 531), decided in 1916, the Supreme Court denied the petition of Virginia for a writ of execution, holding, as stated in the headnote, 'that a State should be given an opportunity to accept and abide by the decision of this court; and, in a case in which the legislature has not met in regular session since the rendition of the decision, motion for execution will be not granted, but denied without prejudice to renew after the next session of the legislature.'

Virginia applies for a mandamus to levy a tax to satisfy the judgement.

The legislature of the State, because whereof the motion of Virginia was denied, has met and adjourned since the decision of this phase of the case, and West Virginia has, at the instance of Virginia, appeared at the bar of the court to show cause why its legislature should not be mandamused to levy a tax to pay such judgement. To the rule requiring West Virginia to show cause, that State interposed a motion to dismiss, and upon the rule to show cause and the motion to dismiss the case of *Virginia* v. *West Virginia* (247 U.S. 531), decided in 1918, has entered upon its ninth phase, which is unlikely to be the last, unless the hitherto unrepentant debtor should experience a change of heart or yield to the dictates of reason between the present decree and the order for argument at an ensuing term of court.

Judgement of the court.

Mr. Chief Justice White, in delivering the opinion of the court in this most important case—to settle the question of execution in favour of an execution against the State in a judgement had by and in favour of a sister State—has prefixed the following summary of the decree of the court in this controversy of *Virginia* v. *West Virginia* (234 U.S. 117), rendered in 1915, which should be before the reader :

Effect of the previous judgement.

In the suit in which the judgment was rendered, Virginia, invoking the original jurisdiction of this court, sought the enforcement of a contract by which it was averred West Virginia was bound. The judgment which resulted was for $12,393,929.50 with interest and it was based upon three propositions specifically found to be established : First, that when territory was carved out of the dominion of the State of Virginia for the purpose of constituting the area of the State of West Virginia, the new State, coincident with its existence, became bound for and assumed to pay its just proportion of the previous public debt of Virginia. Second, that this obligation of West Virginia was the subject of a contract between the two States made with the consent of Congress, and was incorporated into the constitution by which West Virginia was admitted by Congress into the Union, and therefore became a condition of such admission and a part of the very governmental fiber of that State. Third, that the sum of the judgment rendered constituted the equitable proportion of this debt due by West Virginia in accordance with the obligations of the contract.[1]

In the course of the judicial proceedings to which the controversy in question has given rise, the State of West Virginia has been shown every consideration, and

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 589).

has been allowed to present its case unembarrassed by technicalities of pleading, a fact thus stated by the Chief Justice upon the very threshhold :

Both States received every consideration.

The opinions referred to will make it clear that both States were afforded the amplest opportunity to be heard and that all the propositions of law and fact urged were given the most solicitous consideration. Indeed, it is also true that in the course of the controversy, as demonstrated by the opinions cited, controlled by great consideration for the character of the parties, no technical rules were permitted to frustrate the right of both of the States to urge the very merits of every subject deemed by them to be material.[1]

It is certainly no exaggeration to say that the annals of the Supreme Court do not disclose more tender care and solicitude for the rights of the defendant and greater consideration for its contentions than this very case.

The question of execution against a State.

The question before the court in this phase of the controversy is that of execution, and while we are accustomed to see the judgements and decrees of courts executed by force, if need be, against private litigants, there has hitherto been no instance in our judicial annals of the enforcement of a judgement against a State, and it cannot be said that the present decree is an enforcement. It seems, however, to be an unequivocal decision by the court that power exists in the Congress to provide for execution of the judgement, at least where the Congress can be considered as a party to the contract upon which the case arose, in that the assumption by West Virginia of an equitable share of the debt of Virginia contracted before the separation of the States was contained in the constitution of West Virginia, approved by Congress in admitting it to statehood. It appears also to be an unequivocal decision of the court of its own right to take such means as are at its disposal to secure the execution of the judgement which it has rendered against the State of West Virginia. Finally, it may be taken as an unequivocal decision by the court that execution in either case extends to the State or governmental agency of the State as such.

Since the decree in question does not dispose of the case and the views expressed by the court in the course of its opinion will be debated and argued by learned counsel at its bar, it seems advisable to summarize the opinion of the Chief Justice with only a modicum of comment, which should perhaps be reserved for the final decision, when the case in its entirety and in its various phases may be more appropriately considered.

The opinion of the Chief Justice is a very learned one, in that he does not content himself with the proceedings of the Federal Convention in order to justify suits between States, but pushes his investigations beyond the proceedings of that illustrious assembly, and finds the precedent not only for suits between States, but by citizens of a State against another State in the practice of the King in Privy Council, deciding disputes between colonies not merely at the instance of a colony but at the instance of the colonist. In speaking of this matter, the Chief Justice says :

Historical summary.

Bound by a common allegiance and absolutely controlled in their exterior relations by the mother country, the colonies before the Revolution were yet as regards each other practically independent, that is, distinct one from the other. Their common intercourse more or less frequent, the contiguity of their boundaries, their conflicting claims, in many instances, of authority over undefined and outlying territory, of

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 590).

necessity brought about conflicting contentions between them. As these contentions became more and more irritating, if not seriously acute, the necessity for the creation of some means of settling them became more and more urgent, if physical conflict was to be avoided. And for this reason, it is to be assumed, it early came to pass that differences between the colonies were taken to the Privy Council for settlement and were there considered and passed upon during a long period of years, the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by Parliament. This power, it is undoubtedly true, was principally called into play in cases of disputed boundary, but that it was applied also to the complaint of an individual against a colony concerning the wrongful possession of property by the colony alleged to belong to him, is not disputed. This general situation as to the disputes between the colonies and the power to dispose of them by the Privy Council was stated in *Rhode Island* v. *Massachusetts*, 12 Peters 657, 739 *et seq.*, and will be found reviewed in the authorities referred to in the margin.[1]

So much for the situation antecedent to the Declaration of Independence. Next as to the condition of affairs produced by the realization of independence by the States proclaiming their independence. Discussing this phase of the subject, the Chief Justice continues:

Controversies of the Revolution.

When the Revolution came and the relations with the mother country were severed, indisputably controversies between some of the colonies of the greatest moment to them, had been submitted to the Privy Council and were undetermined. The necessity for their consideration and solution was obviously not obscured by the struggle for independence which ensued, for, by the Ninth of the Articles of Confederation, an attempt to provide for them as well as for future controversies was made. Without going into detail it suffices to say that that article in express terms declared the Congress to be the final arbiter of controversies between the States and provided machinery for bringing into play a tribunal which had power to decide the same. That these powers were exerted concerning controversies between the States of the most serious character again cannot be disputed. But the mechanism devised for their solution proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution, a deficiency of power which was generic because resulting from the limited authority over the States conferred by the Articles of Confederation on Congress as to every subject. That this absence of power to control the governmental attributes of the States for the purpose of enforcing findings concerning disputes between them, gave rise to the most serious consequences and brought the States to the very verge of physical struggle, and resulted in the shedding of blood and would, if it had not been for the adoption of the Constitution of the United States, it may be reasonably assumed, have rendered nugatory the great results of the Revolution, is known of all and will be found stated in the authoritative works on the history of the time.[2]

Dismissing this phase of the subject, the Chief Justice next takes up the condition of affairs which he conceives to have resulted from the creation by the States of the more perfect Union, and in the following passage states the consequences which, in his opinion, and in the opinion of the court, in whose

[1] *Acts of the Privy Council*, Colonial Series, vols. i–v, *passim*; Snow, *The Administration of Dependencies*, chap. v, *et passim*; Gannett, *Boundaries of the United States*, pp. 35, 41, 44, 49–52, 73, 88; *Story on the Constitution* (5th ed.), §§ 80, 83, 1681. (*State of Virginia* v. *State of West Virginia*, 246 U.S. 565, 597–8.)

[2] Fiske, *The Critical Period of American History*, pp. 147 *et seq.*; McMaster, *History of the People of the United States*, vol. i, pp. 210 *et seq.*; Miner, *History of Wyoming*.

See also *Story on the Constitution* (5th ed.), §§ 1679, 1680; 131 U.S. Appendix L. (*State of Virginia* v. *State of West Virginia*, 246 U.S. 565, 598–9.)

behalf he speaks, resulted from the consent of the States to be sued in the Supreme Court:

The remedy found by the Constitution.

Throwing this light upon the constitutional provisions, the conferring on this court of original jurisdiction over controversies between States, the taking away of all authority as to war and armies from the States and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against. This result stands out in the boldest possible relief when it is borne in mind that, not a want of authority in Congress to decide controversies between States, but the absence of power in Congress to enforce as against the governments of the States its decisions on such subjects, was the evil that cried aloud for cure, since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress and the judicial power as to States created, joined with the prohibitions placed upon the States, all combined to unite the authority to decide with the power to enforce,—a unison which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future. And, while it may not materially add to the demonstration of the result stated, it may serve a useful purpose to direct attention to the probable operation of tradition upon the mind of the framers, shown by the fact that, harmonizing with the practice which prevailed during the colonial period in the Privy Council, the original jurisdiction as conferred by the Constitution on this court embraced not only controversies between States but between private individuals and a State—a power which following its recognition in *Chisholm* v. *Georgia*, 2 Dallas, 419, was withdrawn by the adoption of the Eleventh Amendment.[1]

It is perhaps permissible to interrupt the narrative of the Chief Justice, to suggest that Madison's Notes of the debates in the Federal Convention of 1787 disclose the fact, as stated by the Chief Justice in the passage immediately following the passage quoted, that the provisions of the Constitution permitting suits against States in the Supreme Court were adopted without debate, but that the Notes abound with passages, negativing the employment of coercion against States in their political capacity. As also pointed out by the Chief Justice, there is little reference to this matter in the debates as made public in the State conventions ratifying the Constitution.

It is perhaps also permissible to state, in this connexion, that the Constitution was not an instrument of government imposed from above upon subordinate political communities; that the restrictions upon the States were not the limitations of power imposed by a sovereign upon provinces, but that the Union itself was a creation of the States; that the instrument of government which we call the Constitution was drafted by delegates of the States, declared by themselves in the then existing Confederation to be sovereign, free, and independent; that the government of this Union created by the Constitution is one of enumerated powers voluntarily granted, or which follow by necessary implication; that the restrictions imposed upon the States were in fact self-denying ordinances or voluntary renunciations of power which they would otherwise have exercised; that, among the batch of amendments proposed by the first Congress to define the limits of powers granted to the General Government and to secure the States or their peoples against apprehended usurpation of power, the 10th provided that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'; that the assumption of jurisdiction by the Supreme Court

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 599-600).

of a suit by a citizen of the State of South Carolina against the State of Georgia, to which the Chief Justice refers, in accordance with the provisions of the Constitution under consideration by the Chief Justice, led to the passage of the 11th amendment, as the Chief Justice himself says, that 'the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State'. But to the opinion of the Chief Justice, who continues:

The fact that in the Convention, so far as the published debates disclose, the provisions which we are considering were adopted without debate, it may be inferred, resulted from the necessity of their enactment, as shown by the experience of the colonies and by the spectre of turmoil, if not war which, as we have seen, had so recently arisen from the disputes between the States, a danger against the recurrence of which there was a common purpose efficiently to provide. And it may well be that a like mental condition accounts for the limited expressions concerning the provisions in question in the proceedings for the ratification of the Constitution which followed, although there are not wanting one or two instances where they were referred to which when rightly interpreted make manifest the purposes which we have stated.[1]

Discussions of 1787–8.

In support of this point of view, the Chief Justice refers to three passages in the Pennsylvania Convention and to two from the proceedings of the Virginia Convention ratifying the Constitution, and to the 81st number of the *Federalist*.

The first three references of the Chief Justice are to the statements of Mr. James Wilson, advocating the adoption of the Constitution by the Pennsylvania Convention.

After referring to the State governments and saying that their existence is one of the most prominent features of the proposed constitution, and adverting to the situation under the Articles of Confederation, Mr. Wilson asks, 'For what purpose give the power to make laws, unless they are to be executed? And, if they are to be executed, the executive and judicial powers will necessarily be engaged in the same business.'

James Wilson of Pennsylvania, 1787.

Then follows the passage, page 462 of the second volume of Elliot's *Debates*, to which the Chief Justice probably refers, in which Mr. Wilson says:

Do we wish a return of those insurrections and tumults to which a sister state was lately exposed? or a government of such insufficiency as the present is found to be? Let me, sir, mention one circumstance in the recollection of every honorable gentleman who hears me. To the determination of Congress are submitted all disputes between states concerning boundary, jurisdiction, or right of soil. In consequence of this power, after much altercation, expense of time, and considerable expense of money, this state was successful enough to obtain a decree in her favor, in a difference then subsisting between her and Connecticut; but what was the consequence? The Congress had no power to carry the decree into execution. Hence the distraction and animosity, which have ever since prevailed, and still continue in that part of the country. Ought the government, then, to remain any longer incomplete? I hope not. No person can be so insensible to the lessons of experience as to desire it.[2]

The second reference of the Chief Justice is apparently to the passage on page 490 of the same volume in which Mr. Wilson, speaking of the extension of the judicial power 'to Controversies between two or more States', says: 'This power is vested in the present Congress; but they are unable, as I have already shown, to enforce their decisions. The additional power of carrying their decree into execution, we find, is therefore necessary, and I presume no exception will be taken to it.'

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 600).

[2] Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as recommended by the General Convention at Philadelphia, in 1787* (2nd ed. 1836, reprint of 1891).

In the third reference, to page 527 of the same volume, Mr. Wilson, advocating the adoption of the Constitution, uses the following language :

If we adopt this system of government, I think we may promise security, stability, and tranquillity, to the governments of the different states. They would not be exposed to the danger of competition on questions of territory, or any other that have heretofore disturbed them. A tribunal is here found to decide, justly and quietly, any interfering claim ; and now is accomplished what the great mind of Henry IV of France had in contemplation—a system of government for large and respectable dominions, united and bound together, in peace, under a superintending head, by which all their differences may be accommodated, without the destruction of the human race. We are told by Sully that this was the favorite pursuit of that good king during the last years of his life ; and he would probably have carried it into execution, had not the dagger of an assassin deprived the world of his valuable life. I have, with pleasing emotion, seen the wisdom and beneficence of a less efficient power under the Articles of Confederation, in the determination of the controversy between the states of Pennsylvania and Connecticut ; but I have lamented that the authority of Congress did not extend to extinguish, entirely, the spark which has kindled a dangerous flame in the district of Wyoming.

Let gentlemen turn their attention to the amazing consequences which this principle will have in this extended country. The several states cannot war with each other ; the general government is the great arbiter in contentions between them ; the whole force of the Union can be called forth to reduce an aggressor to reason. What a happy exchange for the disjointed, contentious state sovereignties !

It is, perhaps, permissible to mention that these three references are to the views of Mr. James Wilson, who, as a member of the Federal Convention advocating the extreme views of the larger States, sought to reduce all of them to the position of provinces, to subject their laws to a Council of Revision, and whose opinion as a Justice of the Supreme Court in the Chisholm case, to which the Chief Justice refers, is believed to have led to the passage of the 11th amendment of the Constitution, withdrawing from the Supreme Court the power in future to entertain suit by a citizen of a State against another State.

Edmund Randolph of Virginia, 1788.

The fourth and fifth references to Elliot's *Debates* are to the proceedings of the Virginia Convention for the ratification of the Constitution. In the first of these Mr. Edmund Randolph, then Governor of Virginia, speaking of the Federal Judiciary as an agent in promoting harmony between us and foreign powers, said :

Harmony between the states is no less necessary than harmony between foreign states and the United States. Disputes between them ought, therefore, to be decided by the federal judiciary. Give me leave to state some instances which have actually happened, which prove to me the necessity of the power of deciding controversies between two or more states. The disputes between Connecticut and Pennsylvania, and Rhode Island and Connecticut, have been mentioned. I need not particularize these. Instances have happened in Virginia. There have been disputes respecting boundaries. Under the old government, as well as this, reprisals have been made by Pennsylvania and Virginia on one another. Reprisals have been made by the very judiciary of Pennsylvania on the citizens of Virginia. Their differences concerning their boundaries are not yet perhaps ultimately determined. The legislature of Virginia, in one instance, thought this power right. In the case of Mr. Nathan, they thought the determination of the dispute ought to be out of the state, for fear of partiality.

It is with respect to the rights of territory that the state judiciaries are not competent. If the claimants have a right to the territories claimed, it is the duty of

a good government to provide means to put them in possession of them. If there be no remedy, it is the duty of the general government to furnish one.[1]

In the second of these references, and the last which the Chief Justice makes to Elliot's *Debates*, Mr. Randolph, still speaking of the judiciary, uses the following language :

An honorable gentleman has asked, Will you put the body of the state in prison ? How is it between independent states ? If a government refuses to do justice to individuals, war is the consequence. Is this the bloody alternative to which we are referred ? Suppose justice was refused to be done by a particular state to another ; I am not of the same opinion with the honorable gentleman. I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*. But it is objected that this is retrospective in its nature. If thoroughly considered, this objection will vanish. It is only to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government.[2]

It is, perhaps, also permissible to note in this connexion that Mr. Randolph introduced on behalf of Virginia the resolutions from that State which were the basis of the discussion in the Federal Convention and the basis of the Constitution drafted by that body ; that he became so dissatisfied with its proceedings that he refused to sign the Constitution, that upon reflection he consented to be a member of the Virginia Convention for its ratification, in which body he urged its ratification and that, as Attorney-General of the United States, he appeared for the plaintiff in the Chisholm case, advocating an interpretation of the Constitution permitting the Supreme Court to assume jurisdiction, which was repudiated by the Eleventh Amendment.

Alexander Hamilton in the *Federalist*, 1788.

The 81st article of the *Federalist*, entitled ' Distribution of the Authority of the Judiciary ', to which the Chief Justice refers in the next place, was written by Alexander Hamilton and appears to have but one reference to the suability of states. It is thus worded :

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind ; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe ? How could recoveries be enforced ? It is evident it could not be done without waging war against the contracting State ; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.[3]

[1] Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as recommended by the General Convention at Philadelphia, in 1787*, vol. iii, p. 571.

[2] *Ibid.*, vol. iii, p. 573.

[3] Paul Leicester Ford, *The Federalist, A Commentary on the Constitution of the United States by Alexander Hamilton, James Madison, and John Jay*, 1898, pp. 545–6.

As the Chief Justice has appealed to the authority of Hamilton, it may be permissible to quote a passage from the 16th article of the *Federalist*, entitled 'Defect of the Confederation in its Inability to Coerce', likewise written by Hamilton, in which he says:

Whoever considers the populousness and strength of several of these States singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is little less romantic than the monster-taming spirit which is attributed to the fabulous heroes and demi-gods of antiquity.

Even in those confederacies which have been composed of members smaller than many of our counties, the principle of legislation for sovereign States, supported by military coercion, has never been found effectual. It has rarely been attempted to be employed but against the weaker members; and in most instances attempts to coerce the refractory and disobedient have been the signals of bloody wars, in which one half of the confederacy has displayed its banners against the other half.[1]

So much by way of general introduction and comment upon the authorities invoked in this portion of the opinion of the court.

The questions involved in this phase of the controversy between Virginia and West Virginia are and are thus stated by the Chief Justice:

Questions involved in the present case.

1. *May a judgment rendered against a State as a State be enforced against it as such, including the right, to the extent necessary for so doing, of exerting authority over the governmental powers and agencies possessed by the State?*

2. *What are the appropriate remedies for such enforcement?*

Regarding these questions the creditor and the debtor held widely divergent views, Virginia contending, to quote the language of the Chief Justice, that 'as the Constitution subjected the State of West Virginia to judicial authority at the suit of the State of Virginia, the judgement which was rendered in such a suit binds and operates upon the State of West Virginia, that is, upon that State in a governmental capacity, including all instrumentalities and agencies of state power, and indirectly binding the whole body of the citizenship of that State and the property which, by the exertion of powers possessed by the State, are subject to be reached for the purpose of meeting and discharging the state obligation'.[2] This being the case, extraordinary means should be taken to enforce the judgement, inasmuch as the judgement applies to the State and its agencies, and just as the judicial power may enforce the levy of a tax to meet a judgement against a municipality empowered to raise money by taxation in order to pay a particular debt, the legislature of the State of West Virginia may be ordered by the court, by writ of mandamus, to impose a tax to pay the debt due by that State to the State of Virginia. In support of this contention Virginia cited many decisions of the Supreme Court[3] in which municipalities were mandamused to levy taxation to meet debts which they had contracted and to pay which they had been authorized to raise revenue by specific taxation.

Contention of Virginia.

Cases of mandamus to municipalities.

These cases are indeed in point, for the municipality is the creature of the

[1] Paul Leicester Ford, *The Federalist, A Commentary on the Constitution of the United States by Alexander Hamilton, James Madison, and John Jay*, pp. 99–100.

[2] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 594).

[3] *Supervisors* v. *United States* (4 Wallace, 435); *von Hoffman* v. *City of Quincy* (4 Wallace, 535); *City of Galena* v. *Amy* (5 Wallace, 705); *Riggs* v. *Johnson County* (6 Wallace, 166); *Walkley* v. *City of Muscatine* (6 Wallace, 481); *Labette County Commissioners* v. *Moulton* (112 U.S. 217); *County Commissioners of Cherokee County* v. *Wilson* (109 U.S. 621).

State and invested by act of the legislature of the State with power to raise taxes for the particular purpose. But it does not necessarily follow that the legislative branch of the Government of the Union can by law either invest or compel a State of the Union to levy taxation, for the Union is the creature of the States, not the State the creature of the Union, and the government of the Union is one of enumerated and limited powers, whereas the State, as regards the municipality, is not limited in its powers. It may indeed be that the United States in Congress assembled may possess the power to pass an act directing the State of West Virginia to levy taxation to meet the judgement rendered in behalf of Virginia, just as the State of West Virginia could authorize and direct one of its municipalities so to do. But the States of the American Union are not municipalities created by the Union, nor are they provinces, as the Colonies in their subordinate relation to the King in Council, and the question therefore is whether the States of the Union have granted by direct or necessary implication a power of this nature to the General Government.

Contention of West Virginia

These views are, practically, the views of West Virginia, whose counsel contended, to quote the language of the Chief Justice, ' that the defendant as a State may not as to its powers of government reserved to it by the Constitution be controlled or limited by process for the purpose of enforcing the payment of the judgement.'[1] Counsel drew a distinction between property which the State may own but which is not used for a governmental purpose, and appears to admit that in such a case execution may issue against it, but denies that execution can properly be issued against property of the State used by it for a governmental purpose, and that because of this distinction the cases relied upon by Virginia do not raise a right to coerce the State to exercise its power of taxation, by means thereof creating a fund from which the judgement in question may be paid.

Counsel for West Virginia do not appear to deny that execution may issue to enforce a judgement in favour of a State against a defendant State obtained at the instance of the plaintiff State, but that such a judgement should not be executed in such a way as to attack and control the State, as the authority to issue execution to give effect to the judgement is necessarily restrained by the provisions of the Constitution of the United States, which recognized the States and their agencies through which governmental power is exercised. On these contentions of West Virginia, the Chief Justice says :

overruled by the court.

It needs no argument to demonstrate that both of these theories are incompatible with and destructive of the very numerous cases decided by this court to which we have referred. As it is certain that governmental powers reserved to the States by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were not subject to judicial power, that is, to be impleaded, it must follow that, when the Constitution gave original jurisdiction to this court to entertain at the instance of one State a suit against another, it must have been intended to modify the general rule, that is, to bring the States and their governmental authority within the exceptional judicial power which was created.[2]

Indeed, the Chief Justice is so sure of these views as to say that ' no other rational explanation can be given for the provision ' ; and he finds for them a further support in ' the context of the Constitution, that is,' to quote his exact language, ' the express

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 595–6).
[2] *Ibid.* (246 U.S. 565, 595–6).

prohibition which it contains as to the power of the States to contract with each other except with the consent of Congress, the limitations as to war and armies, obviously intended to prevent any of the States from resorting to force for the redress of any grievance real or imaginary, all harmonize with and give force to this conception of the operation and effect of the right to exert, at the prayer of one State, judicial authority over another.' [1]

It must be admitted that these are impressive views and that the judicial remedy proposed by the framers of the Constitution and adopted by the States was intended to be a substitute for diplomatic negotiation, resulting in diplomatic agreements between the States, on the one hand, and a resort to force, on the other, in the absence of diplomatic negotiation or agreement. The States, however, were not averse to agreements or to the use of force in appropriate cases, but they foresaw that, if they did not renounce their right to negotiate and to enter into compacts with one another, the relations of the States might by agreement be changed and likewise the relation of the States to the Union by a compact to which only two or three States might be parties, instead of the three-fourths required to change the Constitutional relation, and the States wisely renounced the use of force inasmuch as its exercise might also, and probably would, change the relations between the contending States and between the States and the Union of which all were members.

Renunciation of force by the States.

No objection seems to have been taken to the statement that execution is a necessary consequence of judgement, and 'that judicial power essentially involves the results of its exertion is elementary'.[2] It is elementary to-day in suits between individuals, although at one time the power to enforce is historically later than the power to declare law. But it does not necessarily follow that the power to enforce a judgement between States as such is to be looked upon as elementary in the sense in which it may be so considered between individuals, for the Constitution of the United States is, so far as known, the only instance in which States have consented to be sued by States as a matter of course, and no judgement has hitherto been enforced against them, although there were occasions when the attempt might have been made to do so. Thus, in the Chisholm case, to which the Chief Justice refers, the State of Georgia did not comply with the judgement and a bill was introduced into the legislature threatening with capital punishment anybody who should, within the State of Georgia, attempt to execute that judgement. Thus, the State of Georgia refused to comply with the judgement of the Supreme Court in the case of *Worcester* v. *Georgia* (6 Peters, 515), decided in 1832, and Andrew Jackson, then President, is reported to have stamped his foot, saying 'John Marshall has made his decision; now let him enforce it'. In the case of *Kentucky* v. *Dennison, Governor of Ohio* (24 Howard, 66, 109–10), decided in 1860, considered then and now as a suit by Kentucky against the State of Ohio involving the performance of a Constitutional duty to surrender a fugitive regulated by an act of Congress of 1793, the State of Ohio refused, and on original suit in the Supreme Court for a writ of mandamus to compel the Governor, the then Chief Justice of the United States, speaking for a unanimous court, said:

Earlier cases relating to the coercion of the State.

If the Governor of Ohio refuses to discharge this duty, there is no power delegated

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 596).
[2] *Ibid.* (246 U.S. 565, 591).

to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.

The present Chief Justice refers to three cases of the Supreme Court in support of his views on the essential connexion between the exercise of the judicial power and the execution of its decisions. These cases involve suits between private persons, inasmuch as no case of the Supreme Court is to be found holding that a judgement against a State can be enforced against it. In the case of *Wayman* v. *Southard* (10 Wheaton, 1, 23), decided in 1825, to which the Chief Justice refers, Chief Justice Marshall said :

The jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction.

The second of the cases to which the Chief Justice refers is that of *Bank of the United States* v. *Halstead* (10 Wheaton, 51, 64), decided in 1825, in which Mr. Justice Thompson, speaking for the court, said :

An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment ; and all proceedings on the execution are proceedings in the suit, and which are expressly, by the act of Congress, put under the regulation and control of the Court out of which it issues. It is a power incident to every Court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty, and a due execution of the process, according to its command.

The third is *Gordon* v. *United States* (117 U.S. 697, 702), decided in 1864, in which Chief Justice Taney said :

The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction.

It will be observed that this case is not between States and the statement concerns the exercise of appellate not of original jurisdiction, as in suits between States. On that phase of the question, Chief Justice Taney says :

And it is upon the principle of the perfect independence of this Court, that in cases where the Constitution gives it original jurisdiction, the action of Congress has not been deemed necessary to regulate its exercise, or to prescribe the process to be used to bring the parties before the court, or to carry its judgment into execution. The jurisdiction and judicial power being vested in the court, it proceeded to prescribe its process and regulate its proceedings according to its own judgment, and Congress has never attempted to control or interfere with the action of the Court in this respect.[1]

This latter passage is quoted not to show that the Congress might not regulate process between States, but as indicating that a distinction apparently existed in the

[1] *Gordon* v. *United States* (117 U.S. 697, 701–2).

mind of the then Chief Justice between the exercise of judicial power in cases of appellate and original jurisdiction.

Referring to the fact that in all the cases hitherto decided between States as such, and which he enumerated, the defendant has invariably and voluntarily complied with the judgement, the Chief Justice in this portion of his opinion refers to the case of *South Dakota* v. *North Carolina* (192 U.S. 286, 321), decided in 1904, in which Mr. Justice Brewer, delivering the opinion of the court, mentions in passing that individual members of the court had expressed opinions concerning 'the difficulty of enforcing a judgement for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature'. But the question involved in the present case was not there decided, although it presented itself. In commenting upon the South Dakota case, Chief Justice White says :

Novelty of the present case.

But the question thus left open has no bearing upon and does not require to be considered in the case before us, first, because the power to render the judgment as between the two States whose enforcement is now under consideration is as to them foreclosed by the fact of its rendition. And second, because, while the controversy between the States culminated in a decree for money and that subject was within the issues, nevertheless, the generating cause of the controversy was the carving out of the dominion of one of the States the area composing the other and the resulting and expressly assumed obligation of the newly created State to pay the just proportion of the preëxisting debt, an obligation which, as we have seen, rested in contract between the two States, consented to by Congress and expressed in substance as a condition in the Constitution by which the new State was admitted into the Union.[1]

It is no doubt true that the present case is different from all of its predecessors, and it is difficult not to allow one's feelings to be coloured by the settled belief that West Virginia should satisfy the judgement of the Supreme Court in favour of Virginia, for the reason, if for none other, that its territory was severed from Virginia during the throes of a Civil War, in which that State could not defend itself or have its voice heard ; that the party leaders in West Virginia responsible for the separation of the States felt impelled to assume at least a portion of the debt incurred by Virginia as far as it was expended in West Virginia ; that the assumption of this equitable proportion of indebtedness was included in the State Constitution approved by the Congress, and to that extent is a contract, a constitutional provision of the State of West Virginia, and an act of Congress at one and the same time.

The question, sufficiently complicated in itself, is further complicated, if possible, by the admission by Virginia and by West Virginia as well that the latter State only owns property used for governmental purposes, and that, as stated by the Chief Justice, 'therefore, from the mere issue of an execution, the judgment is not susceptible of being enforced if, under such execution, property actually devoted to immediate governmental uses of the State may not be taken.' [2]

The judgement may be enforced against the State as a government.

For three reasons the Chief Justice and the court, whose opinion he voices, hold that the State as a governmental entity was subjected by the Constitution to the judicial power of the United States 'under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 592–3).
[2] *Ibid.* (246 U.S. 565, 593).

although their exertion may operate upon the governmental powers of the State '.[1]

Question of the appropriate remedies.

The Chief Justice declares that he and his associates are brought face to face with the second question, namely, ' What are the appropriate remedies for such enforcement ? '

The Chief Justice premises that the powers to render judgement and to enforce its execution ' arise from the grant in the Constitution on that subject, looked at from a generic point of view ', that both are federal powers and that because thereof they are to be supported by the legislative, the executive and judicial branches of the Federal Government.[2] But before passing to the question of extraordinary remedies, he states and considers separately the two questions which arise therefrom, (*a*) ' The power of Congress to legislate for the enforcement of the obligation of West Virginia ; ' (*b*) ' The appropriate remedies under existing legislation.'

(*a*) The power of Congress to legislate.

The Chief Justice regards the obligation of West Virginia to pay an equitable proportion of the debt contracted prior to its separation from Virginia as an agreement between the States themselves which they could not negotiate, and which therefore derives its sole validity from the approval of Congress, which necessarily carries with it the right ' to see to its enforcement '. Having this right, the Congress has the power to provide for the execution of the contract, and as the government of the Union is supreme within its grant of sovereign powers, just as the States are supreme within their reserved powers, it follows, to quote the language of the Chief Justice, that ' the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States '. To hold otherwise is to insist, to quote again the Chief Justice, ' that any one State may, by violating its obligations under the Constitution, take away the rights of another and thus destroy constitutional government.' [3]

If in the nature of things the power which the court has to execute its judgement, as stated by the Chief Justice in the earlier portion of his opinion, be insufficient, the Congress may provide such further remedies as are needed, thus supplementing Section 14 of the Judiciary Act of 1789, which, in addition to the writs of *scire facias* and *habeas corpus,* authorized the courts of the United States to issue ' all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law '. (1 Stat. L, c. 20, Section 14, Judiciary Act of September 24, 1789.) This additional process should be provided by the legislature, inasmuch as it is ' the exertion of a legislative and not the exercise of the judicial power '.[4]

(*b*) Remedies under existing laws.

Passing now to the second heading, ' The appropriate remedies under existing legislation,' the Chief Justice says explicitly that the objection of West Virginia to the issue of the mandamus was without merit as far as it was based upon the contention that ' authority to enforce a judgement against a State may not affect state power '.[5] But, as he properly said, ' This does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and on the other hand it is contended that the

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 600).
[2] *Ibid.* (246 U.S. 565, 601).
[3] *Ibid.* (246 U.S. 565, 602).
[4] *Ibid.* (246 U.S. 565, 603).
[5] *Ibid.* (246 U.S. 565, 604).

duty to give effect to the judgement against the State, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel.'[1]

The court, however, while asserting the right, was apparently unwilling to proceed to its exercise. The Chief Justice, therefore, stated that he and his brethren would not dispose of this question at the present time, or of the further question considered by the court of its own motion, 'whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies.'[2] This forbearance on the part of the court appears to be due to the belief that the State of West Virginia might decide to comply with the judgement, for the Court as such possessed the right to enforce its process and Congress the constitutional right to legislate in the premises and to use 'compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution'.[3] The Chief Justice further stated that the court was led to refrain from action 'in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses'.[4]

And with this statement the Chief Justice thus concluded his opinion, which was the unanimous judgement of the court over which he has the honour to preside:

Final decision postponed.

Giving effect to this view, accepting the things which are irrevocably foreclosed—briefly stated, the judgment against the State operating upon it in all its governmental powers and the duty to enforce it viewed in that aspect—, our conclusion is that the case should be restored to the docket for further argument at the next term after the February recess. Such argument will embrace the three questions left open: 1. The right under the conditions previously stated to award the mandamus prayed for; 2. If not, the power and duty to direct the levy of a tax as stated; 3. If means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy, by dealing with the funds or taxable property of West Virginia or the rights of that State, as may secure an execution of the judgment. In saying this, however, to the end that, if, on such future hearing provided for, the conclusion should be that any of the processes stated are susceptible of being lawfully applied (repeating that we do not now decide such questions) occasion for a further delay may not exist, we reserve the right, if deemed advisable, at a day hereafter before the end of the term or at the next term before the period fixed for the hearing, to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state legislature or direct action, to secure the full execution of the judgment, as well as concerning the means otherwise existing in the State of West Virginia, if any, which, by the exercise of the equitable powers in the discharge of the duty to enforce payment, may be available for that purpose.[5]

Results of the judgement.

Dismissing from consideration the questions expressly reserved by the court for future decision, it would seem to be the mature judgement of the Supreme Court of the United States in this phase of the case of *Virginia* v. *West Virginia* (246 U.S. 565), decided in 1918, that the right to enforce its judgement is inherent in the judicial power, although that judgement be against a State, which in the Constitution has consented to be sued by another State of the Union; that such judgement may properly be executed against the State as such, its governmental agencies or property,

[1] *State of Virginia* v. *State of West Virginia* (246 U.S. 565, 604).
[2] *Ibid.* (246 U.S. 565, 604).
[3] *Ibid.* (246 U.S. 565, 604).
[4] *Ibid.* (246 U.S. 565, 605).
[5] *Ibid.* (246 U.S. 565, 605–6).

as well as against property which it may hold in its private capacity; and that Congress possesses the constitutional right to take such measures in the execution of this right as it may deem expedient to coerce the State to comply with the judgement of the Supreme Court had against a State in the constitutional exercise of judicial power.

80. State of Arkansas v. State of Tennessee.

(247 U.S. 461) 1918.

In accordance with precedent observed in boundary cases between States, the Supreme Court decided in the first phase of *Arkansas* v. *Tennessee* (246 U.S. 158), decided in 1918, that the parties might submit the form of an interlocutory decree to carry into effect the conclusions which the court had reached. In the interval between the 4th of March, when the case was originally decided, and June 10, 1918, counsel for the contending States agreed upon the commission of three persons, who thereupon were named by the court, 'to run, locate, and designate the boundary line between said States along that portion of the bed of said river that was left dry as the result of said avulsion, in accordance with the above principles.' The decree in this phase of the case provided, among other things, that

Decree by consent appointing a boundary commission.

1. The true boundary line between the States of Arkansas and Tennessee, aside from the question of the avulsion of 1876, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi river as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion of March 7, 1876, which resulted in the formation of a new channel known as the Centennial cut-off, the boundary line between said States was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said States should now be located along that portion of the bed of said river that was left dry as the result of said avulsion, according to the middle of the main navigable channel as it existed at the time the current ceased to flow therein as the result of said avulsion.

4. A commission consisting of C. B. Bailey, of Wynne, Arkansas, Horace Vandeventer, of Knoxville, Tennessee, and Charles A. Barton, of Memphis, Tennessee, competent persons, is here and now named by the court, upon the suggestion of counsel, to run, locate, and designate the boundary line between said States along that portion of the bed of said river that was left dry as the result of said avulsion, in accordance with the above principles: Commencing at the upper end of the abandoned portion of the river bed at or about the beginning or head of said Centennial Cut-off, and thence following along the middle of the former main channel of navigation by its several courses and windings to the lower end of the abandoned portion of said river bed at or about the terminus or outlet of said Centennial Cut-off.[1]

It was foreseen that the commissioners might be unable, after the lapse of forty years, to 'locate with reasonable certainty the line of the river as it then ran, that is, at or immediately before the avulsion of 1876', and in that event the commission was ordered by the court to report the nature and extent of the erosions and accretions which had occurred in the old channel prior to its abandonment by the current

[1] *State of Arkansas* v. *State of Tennessee* (247 U.S. 461, 461–2).

as the result of said avulsion, and to 'give its findings of fact and the evidence on which the same are based '.[1]

Powers granted to the commission.

The balance of the decree contained the provisions which have become usual in such cases; that the commissioners should, before entering upon the discharge of their duties, take an oath for their faithful performance, after which they were authorized and empowered 'to make examination of the territory in question, and to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line; to summon witnesses and take evidence under oath; to compel the attendance of witnesses and require them to testify; to call for and require the production of papers and other documentary evidence; such evidence, however, to be taken upon notice to the parties, with permission to attend by counsel and cross-examine the witnesses; and all evidence taken and all exceptions thereto and rulings thereon shall be preserved and certified and returned with the report of said commissioners; and said commissioners are also at liberty to refer to and consult the printed record in the cause and the opinion of this court delivered on March 4, 1918, and to do all other matters necessary to enable them to discharge their duties and attain the end to be accomplished conformably to this decree '.[2]

Foreseeing that a vacancy might occur in the personnel of the board, either through death or inability to act, or for any other reason, the Chief Justice was authorized to fill the vacancy or vacancies in the commission. As large bodies are proverbially said to move slowly, the decree wisely ordered the commissioners to 'proceed with all convenient dispatch to discharge their duties conformably to this decree ', and, in their discretion, they were specifically authorized 'to request the co-operation and assistance of the state authorities of Arkansas and Tennessee, or either of those States ', in the performance of the duties imposed upon them by the decree. That a foundation should be laid for such co-operation, the clerk of the court was directed to 'forward at once to the Governor of each of said States of Arkansas and Tennessee and to each of the commissioners hereby appointed a copy of this decree and of the opinion of this court delivered herein March 4, 1918, duly authenticated '. As a further incentive to speed on the part of the commissioners, they were instructed to 'make a report of their proceedings under this decree as soon as practicable and on or before such date as hereafter shall be fixed by the court ', and all other matters relating to the case were reserved 'until the coming in of said report '.[3]

[1] *State of Arkansas* v. *State of Tennessee* (247 U.S. 461, 462).
[2] *Ibid.* (247 U.S. 461, 462–3).
[3] *Ibid.* (247 U.S. 461, 463–4).

XI.

A LESSON FOR THE WORLD AT LARGE.

General Summary.

Such are the controversies between the States of the American Union which have been decided in the Supreme Court of the United States, by that due process of law which obtains between individuals, between the States of the Union, and which must one day obtain between the nations of the world, to the end, as stated in the Constitution of Massachusetts of 1780, the oldest of existing written instruments of this kind, 'that it may be a government of laws and not of men.' The thirteen American States were, after their Declaration of Independence, sovereign, free, and independent, and they were only held together in an informal Union by pressure from the outside. They felt, however, the need of formal union, and two years after their Declaration of Independence they entered into what they called in the Articles of Confederation, 'a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.' But the Articles of Confederation, approved by the Congress on November 15, 1777, were only to become effective and binding upon all when the last of the thirteen States had ratified them. This took place some three and a half years later, to be accurate, on March 1, 1781, by the adherence of the State of Maryland. The Union was declared in the caption of the Articles to be perpetual. It was a very loose one, properly termed by the States themselves to be a league of friendship, confined to matters of common interest, each State retaining, as specifically stated in Article 2 thereof, 'its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by the confederation expressly delegated to the United States in Congress assembled.' The leaders of opinion in the different States foresaw that they were likely to have controversies in the future, as the States had while still Colonies, and which they themselves had subsequently to the Declaration of Independence. They had not been over-successful in settling these disputes, which in some instances had become quarrels, by direct negotiation, and they were unwilling to continue this means of adjustment and accommodation. They therefore renounced it for themselves, allowing the Congress of the Confederation to indulge in diplomatic discussion and argument with the outer world. War existing at the time between Great Britain on the one hand and the States on the other, they were unwilling that war should exist between the States. Therefore they renounced the right to wage war against one another. To settle their disputes, which would otherwise engender quarrels, and perhaps degenerate into wars, they interjected between diplomacy and war, both of which they renounced, the method of judicial settlement, providing in the ninth of the Articles of Confederation for the selection of temporary commissions with a limited number of judges, to be selected by the agents of the States in dispute, with the approbation of Congress,

Judicial settlement midway between diplomacy and war.

or upon failure of the agents to agree, to select commissioners from a panel of thirty-nine, composed of three chosen by the Congress from each of the States, by striking alternately a name from the list of thirty-nine, beginning with the agent of the defendant, or, in his absence or unwillingness to act, by the Secretary of the Congress, until thirteen names were left, from which nine were drawn by lot, of whom not less than five nor more than seven were to form the Court and act as commissioners. By agreement of the agents the commission was appointed which decided in 1781 the boundary dispute between *Pennsylvania* and *Connecticut* (131 U.S. *Appendix*, liv), a dispute which had embittered the relations of these two States and had been the cause of bloodshed in Pennsylvania, in which the land in question lay. A commission was appointed in 1786 by the method of alternate striking to decide a boundary dispute between *South Carolina* and *Georgia* (131 U.S. *Appendix*, lxii), but the cause was settled by the parties out of court. The success of the Commission in the case of *Pennsylvania* v. *Connecticut*, and the constitution of a commission in *South Carolina* v. *Georgia* showed that justice could be administered by a commission composed of Commissioners agreed upon by the parties, and that one could be constituted without their agreement upon the judges. However, the difficulty of creating a temporary tribunal for each individual case, and the delay involved therein caused the framers of the Constitution to invest the Court of the States, which they were forming for the more perfect union, with the jurisdiction which, under the ninth of the Articles of Confederation, was to be exercised by temporary commissions created for the occasion. They had renounced diplomacy; they had abjured war under the Articles of Confederation. The temporary tribunal did not give satisfaction, although the principle did. They retained therefore the principle of judicial settlement, fitting it to the needs of a more perfect union by conferring the jurisdiction to be exercised through the Congress representing the States upon the Supreme Court of the United States, which, in name and in fact as well as in theory, is the judicial agent of the States, and is the permanent Court instead of a temporary commission, in which the States of the Union agreed to settle their controversies by due process of law.

Method of selecting Commissioners to settle disputes.

Establishment of a permanent Court.

The following States have, as shown by the records of the Court, been parties plaintiff in controversies between States:

1. Alabama
   Georgia (23 Howard, 505) 1859.
2. Arkansas
   Tennessee (246 U.S. 158) 1918.
   Tennessee (247 U.S. 461) 1918.
3. Florida
   Georgia (11 Howard, 293) 1850.
   Georgia (17 Howard, 478) 1854.
4. Indiana
   Kentucky (136 U.S. 479) 1890.
   Kentucky (159 U.S. 275) 1895.
   Kentucky (163 U.S. 520) 1896.
   Kentucky (167 U.S. 270) 1897.

5. Iowa
   - Illinois (147 U.S. 1) 1893.
   - Illinois (151 U.S. 238) 1894.
   - Illinois (202 U.S. 59) 1906.

6. Kansas
   - Colorado (185 U.S. 125) 1902.
   - Colorado (206 U.S. 46) 1907.

7. Kentucky
   - Ohio (24 Howard, 66) 1860.

8. Louisiana
   - Texas (176 U.S. 1) 1900.
   - Mississippi (202 U.S. 1) 1906.
   - Mississippi (202 U.S. 58) 1906.

9. Maryland
   - West Virginia (217 U.S. 1) 1910.
   - West Virginia (217 U.S. 577) 1910.
   - West Virginia (225 U.S. 1) 1912.

10. Massachusetts
    - Rhode Island (12 Peters, 755) 1838.

11. Missouri
    - Iowa (7 Howard, 660) 1849.
    - Iowa (10 Howard, 1) 1850.
    - Kentucky (11 Wallace, 395) 1870.
    - Iowa (160 U.S. 688) 1896.
    - Iowa (165 U.S. 118) 1897.
    - Illinois (180 U.S. 208) 1901.
    - Nebraska (196 U.S. 23) 1904.
    - Nebraska (197 U.S. 577) 1905.
    - Illinois (200 U.S. 496) 1906.
    - Illinois (202 U.S. 598) 1906.
    - Kansas (213 U.S. 78) 1908.

12. Nebraska
    - Iowa (143 U.S. 359) 1892.
    - Iowa (145 U.S. 519) 1892.

13. New Hampshire
    - Louisiana (108 U.S. 76) 1883.

14. New Jersey
    - New York (3 Peters, 461) 1830.
    - New York (5 Peters, 284) 1831.
    - New York (6 Peters, 323) 1832.

15. New York
    - Connecticut (4 Dallas, 1) 1799.
    - Connecticut (4 Dallas, 3) 1799.
    - Connecticut (4 Dallas, 6) 1799.
    - Louisiana (108 U.S. 76) 1883.

16. North Carolina
    - Tennessee (235 U.S. 1) 1914.
    - Tennessee (240 U.S. 652) 1916.

17. Rhode Island
    - Massachusetts (7 Peters, 651) 1833.
    - Massachusetts (11 Peters, 226) 1837.
    - Massachusetts (12 Peters, 657) 1838.

Massachusetts (13 Peters, 23) 1839.
Massachusetts (14 Peters, 210) 1840.
Massachusetts (15 Peters, 233) 1841.
Massachusetts (4 Howard, 591) 1846.

18. South Carolina
    Georgia (93 U.S. 4) 1876.
19. South Dakota
    North Carolina (192 U.S. 286) 1904.
20. Tennessee
    Virginia (177 U.S. 501) 1900.
    Virginia (190 U.S. 64) 1903.
21. Virginia
    West Virginia (11 Wallace, 39) 1870.
    Tennessee (148 U.S. 503) 1893.
    Tennessee (158 U.S. 267) 1895.
    West Virginia (206 U.S. 290) 1907.
    West Virginia (209 U.S. 514) 1908.
    West Virginia (220 U.S. 1) 1911.
    West Virginia (222 U.S. 17) 1911.
    West Virginia (231 U.S. 89) 1913.
    West Virginia (234 U.S. 117) 1914.
    West Virginia (238 U.S. 202) 1915.
    West Virginia (241 U.S. 531) 1916.
    West Virginia (246 U.S. 565) 1918.
22. Washington
    Oregon (211 U.S. 127) 1908.
    Oregon (214 U.S. 205) 1909.

The following States have been parties defendant :

1. Colorado
    Kansas (185 U.S. 125) 1902.
    Kansas (206 U.S. 46) 1907.
2. Connecticut
    New York (4 Dallas, 1) 1799.
    New York (4 Dallas, 3) 1799.
    New York (4 Dallas, 6) 1799.
3. Georgia
    Cherokee Nation (5 Peters, 1) 1831.
    Florida (11 Howard, 293) 1850.
    Florida (17 Howard, 478) 1854.
    Alabama (23 Howard, 505) 1859.
    South Carolina (93 U.S. 4) 1876.
4. Illinois
    Iowa (147 U.S. 1) 1893.
    Iowa (151 U.S. 238) 1894.
    Missouri (180 U.S. 208) 1901.
    Missouri (200 U.S. 496) 1906.
    Iowa (202 U.S. 59) 1906.
    Missouri (202 U.S. 598) 1906.
    Kansas (213 U.S. 78) 1908.
5. Iowa
    Missouri (7 Howard, 660) 1849.
    Missouri (10 Howard, 1) 1850.

Nebraska (143 U.S. 359) 1892.
Nebraska (145 U.S. 519) 1892.
Missouri (160 U.S. 688) 1892.
Missouri (165 U.S. 118) 1897.

6. Kansas
   Missouri (213 U.S. 78) 1908.

7. Kentucky
   Missouri (11 Wallace, 395) 1870.
   Indiana (136 U.S. 479) 1890.
   Indiana (159 U.S. 275) 1895.
   Indiana (163 U.S. 520) 1896.
   Indiana (167 U.S. 270) 1897.

8. Louisiana
   New Hampshire (108 U.S. 76) 1883.
   New York (108 U.S. 76) 1883.

9. Massachusetts
   Rhode Island (7 Peters, 651) 1833.
   Rhode Island (11 Peters, 226) 1837.
   Rhode Island (12 Peters, 657) 1838.
   Rhode Island (13 Peters, 23) 1839.
   Rhode Island (14 Peters, 210) 1840.
   Rhode Island (15 Peters, 233) 1841.
   Rhode Island (4 Howard, 591) 1846.

10. Mississippi
    Louisiana (202 U.S. 1) 1906.
    Louisiana (202 U.S. 58) 1906.

11. Nebraska
    Missouri (196 U.S. 23) 1904.
    Missouri (197 U.S. 577) 1905.

12. New York
    New Jersey (3 Peters, 461) 1830.
    New Jersey (5 Peters, 284) 1831.
    New Jersey (6 Peters, 323) 1832.

13. North Carolina
    South Dakota (192 U.S. 286) 1904.

14. Ohio
    Kentucky (24 Howard, 66) 1860.

15. Oregon
    Washington (211 U.S. 127) 1908.
    Washington (214 U.S. 205) 1909.

16. Rhode Island
    Massachusetts (12 Peters, 755) 1838.

17. Tennessee
    Virginia (148 U.S. 503) 1893.
    Virginia (158 U.S. 267) 1895.
    North Carolina (235 U.S. 1) 1914.
    North Carolina (240 U.S. 652) 1916.
    Arkansas (246 U.S. 158) 1918.
    Arkansas (247 U.S. 461) 1918.

18. Texas
    Louisiana (176 U.S. 1) 1900.

19. Virginia
    Tennessee (177 U.S. 501) 1900.
20. West Virginia
    Virginia (11 Wallace, 39) 1870.
    Virginia (206 U.S. 290) 1907.
    Virginia (209 U.S. 514) 1908.
    Maryland (217 U.S. 1) 1910.
    Maryland (217 U.S. 577) 1910.
    Virginia (220 U.S. 1) 1911.
    Virginia (222 U.S. 17) 1911.
    Maryland (225 U.S. 1) 1912.
    Virginia (231 U.S. 89) 1913.
    Virginia (234 U.S. 117) 1914.
    Virginia (238 U.S. 202) 1915.
    Virginia (241 U.S. 531) 1916.
    Virginia (246 U.S. 565) 1918.

The United States appears from the records of the Supreme Court as party plaintiff against the following States :

Michigan (190 U.S. 379) 1903.
North Carolina (136 U.S. 211) 1890.
Texas (143 U.S. 621) 1892, and (162 U.S. 1) 1896).

The United States was a defendant in the following cases, in which the respective States appeared as plaintiff in the Court of Claims :

Indiana (148 U.S. 148) 1893.
Louisiana (123 U.S. 32) 1887, and (127 U.S. 182) 1888.
New York (160 U.S. 598) 1896.

The United States was a party defendant in the Supreme Court in cases filed therein by the following States :

Kansas (204 U.S. 331) 1907.
South Carolina (199 U.S. 437) 1905.

The United States has intervened in the following suits between States begun and subsequently decided in the Supreme Court :

Florida v. Georgia (17 Howard, 478) 1854.
Kansas v. Colorado (206 U.S. 46) 1907.

It will thus be seen that thirty-one States have appeared as plaintiff or defendant in the Supreme Court of the United States in accordance with the general consent to sue or to be sued given in the Constitution ; that the United States has appeared as plaintiff or defendant ten times ; and that in two cases the United States has intervened in the proceedings in order to protect its interests.

In one instance the Cherokee Nation, *Cherokee Nation* v. *Georgia* (5 Peters, 1, 1831), claiming to be a foreign State in the sense in which that term is used in the Constitution, filed its bill in the Supreme Court of the United States against the State of Georgia, but jurisdiction was refused on the ground that the Cherokee Nation, although a State, was a dependent, not a foreign, State. There is no instance as yet of a foreign State recognized as such by international law filing its bill and prosecuting it to final judgement or decree in the Supreme Court against a State of the American Union.

The procedure to be employed between States, even when the United States is

a party, has been worked out by the Supreme Court in the consideration of the concrete case ; the procedure devised and applied has approved itself so well, has so fully met the purposes for which it was framed, and has so stood the test of time and criticism that it has not been found necessary to modify it, as it is sufficiently supple to meet the needs of the parties litigant, whatever the case may be.

It will be observed from the language of the Constitution that the power conferred upon the Supreme Court is judicial power and, as in the case of a court of limited jurisdiction, that august tribunal, whether its jurisdiction is denied in the pleadings or raised by counsel in argument, is obliged to and does satisfy itself that it possesses jurisdiction before proceeding to its exercise. The Court would in controversies of a judicial nature between the States have a large sphere of usefulness, but its usefulness would be limited if it were restricted to judicial questions which were admittedly justiciable at the time of the framing of the Constitution in 1787 or if it should refuse to entertain cases or categories of cases which have since become recognized as justiciable. However, the conception of justice expands and law is a growth. Rules of law become rules of conduct, and situations, which were political, have in the course of time become justiciable. Otherwise the jurisdiction of a court to which justiciable cases, and only such, were referred would be stationary. Fortunately, Mr. Justice Baldwin has shown, in the case of *Rhode Island* v. *Massachusetts* (12 Peters, 657, 736–8), decided in 1836, that disputes formerly considered political, or in which there was no precedent to regard them as justiciable, have, by agreement of the parties to submit them to a court of justice, become justiciable by the very act of submission, and are thereupon to be decided in the Court by the principles of justice and the rules of law. Therefore controversies between States of the American Union submitted to the Supreme Court by virtue of the Constitutional consent to sue and to be sued, are justiciable, although they may not have been so before this provision of the Constitution was adopted.

How controversies become justiciable.

Mr. Justice Baldwin tests his doctrine by an extreme illustration drawn from the domain of prize law, saying, ' It has never been contended that prize courts of admiralty jurisdiction, or questions before them, are not strictly judicial ; they decide on questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted ; a fortiori, if such courts were constituted by a solemn treaty between the State under whose authority the capture was made, and the State whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property '. These questions were admittedly political ; they have become justiciable, and the process is that pointed out by Mr. Justice Baldwin.

Significance for our modern world.

What the nations have done in the past they can do in the future, and by submission make questions justiciable which were not so before, just as they have done on previous occasions, notably in the domain of prize law. What thirteen States of the New World have done, the States of the Old World can assuredly do if only they will, for where there is a will there is a way. The opinion of Mr. Justice Baldwin has shown the way and the decisions of the Supreme Court of the United States in controversies between States have shown the process and devised the machinery

by which disputes, recognized as justiciable or which have become justiciable by submission, may be settled in accordance with the principles of justice and the rules of law obtaining between man and man. The Supreme Court has since its creation entered some eighty decrees in controversies between States, thus furnishing eighty concrete arguments that States can settle their controversies in courts of justice, between the breakdown of diplomacy and resort to war and overcoming the abstract assertion that it cannot be done. Should the leaders of opinion in a world torn and racked by war attempt to do for the society of nations what American statesmen did at the close of a war, from which a more perfect union of the American States emerged, they need only bethink themselves of the Supreme Court of the United States. They can for a few paltry dollars provide themselves with a set of the Supreme Court Reports, in which they will find reproduced the decrees of the Court settling the controversies between States according to principles of justice, the mysteries of judicial and political power unveiled, the distinctions between them stated and the process by which political questions become justiciable revealed, and a procedure which has stood the argument of counsel, satisfied the requirements of justice, and preserved peace between the States of the American Union and the Government of the Union by assigning to each and keeping to each its appropriate sphere of action. Peace has come to the States of the American Union through justice administered in a Court of Justice. To be worth while and to be durable, peace can only come to the States of the Society of Nations through justice administered in its Court of Justice.

An American writer will undoubtedly be pardoned if he insist that the fifty odd nations comprising the society of nations can assuredly do what thirteen States of the American Union have done, and, like the forty-eight States now composing this more perfect Union, settle their controversies without destroying themselves and disturbing the peace of the world.

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Printed in England at the Oxford University Press

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